

STATE OF MONTANA
**DEPARTMENT OF PROFESSIONAL AND
OCCUPATIONAL LICENSING**
BOARD OF ABSTRACTERS

**Report on the Need for State Regulation
of the Abstracting Profession**

1978

A SUNSET PERFORMANCE REVIEW





MORRIS L. BRUSSETT
LEGISLATIVE AUDITOR

STATE OF MONTANA
Office of the Legislative Auditor

STATE CAPITOL
HELENA, MONTANA 59601
406/449-3122

DEPUTY LEGISLATIVE AUDITORS:

JOSEPH J. CALNAN
ADMINISTRATION AND
PROGRAM AUDITS

ELLEN FEAVER
FINANCIAL-COMPLIANCE AND
CONTRACTED AUDITS

STAFF LEGAL COUNSEL
JOHN W. NORTHEY

March 20, 1978

The Legislative Audit Committee
of the Montana State Legislature:

Herein transmitted is our sunset performance audit of the Montana Board of Abstracters. The audit was conducted in response to the 1977 Sunset Law, which terminates the board on July 1, 1979. The intent of the audit was to determine the need for state regulation of Montana's abstracting profession.

The audit focused upon the six questions of the sunset law and includes an examination of board operations. It does not encompass a review of the board's financial transactions or overall compliance with state laws.

There are no formal recommendations in the report since the responsibility for such recommendations lies with the Audit Committee. Nevertheless, we discussed the contents of the report with a large number of individuals and organizations, including the Director of the Department of Professional and Occupational Licensing, the members of the Board of Abstracters, the Governor's Office of Budget and Program Planning and the Insurance Commissioner. Their written replies are included in the report (page 75).

We wish to express our appreciation to the members of the board and to the director of the department and his staff for the assistance they provided during the audit. We also wish to thank the members of the abstracting profession for assistance they gave us.

Respectfully submitted,

Morris L. Brusett

Morris L. Brusett, C.P.A.
Legislative Auditor

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APPOINTIVE and ADMINISTRATIVE OFFICIALS

BOARD OF ABSTRACTERS

		<u>Term Expires</u>
J. L. Cady, Chairman	Great Falls	1980
Russell Culver, Vice Chairman	Baker	1979
Glenn Kenney, Secretary	Helena	1978

DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING

Ed Carney	Director
Lisa Casman	Administrative Secretary

OFFICE OF THE LEGISLATIVE AUDITOR

SUNSET PERFORMANCE AUDIT OF THE
BOARD OF ABSTRACTORS, DEPARTMENT OF PROFESSIONAL
AND OCCUPATIONAL LICENSING

SUMMARY

Montana's 1977 Legislature passed Senate Bill 162 as Chapter 562, Laws of Montana, 1977. The law, commonly referred to as the "sunset law," terminates numerous regulatory boards and agencies and specifically calls for a performance audit of each agency prior to scheduled termination. The sunset law terminates the Board of Abstractors on July 1, 1979. This performance audit is in response to the legal requirement for review of the board prior to termination.

- Chapter I - Introduction (page 1)
- Audit Objective - To evaluate the need for state regulation of the abstracting profession. (page 1)
- Sunset Legislation Intent - State agencies should exist only to be responsive to public health, safety or welfare. (page 1)
- Report Organization (page 2)
 - The report is presented in seven chapters
 - Chapter I is introductory. It summarizes the objectives, organization, and scope of the report.
 - Chapter II presents background on the abstracting profession and the board, and details on board organization, staffing, funding, and objectives.

- Chapter III addresses two questions:
whether there is a reasonable relationship between the exercise of the state's police power to regulate the abstract profession and the protection of the public health, safety, or welfare; and whether the absence of regulation of abstracters would harm the public.
- Chapter IV addresses another question:
whether all facets of the regulatory process are designed solely for public protection.
- Chapter V addresses two other questions:
whether state regulation of the abstract profession has the effect of directly or indirectly increasing costs to the public; and whether such increase is more harmful than the harm which could result from the absence of regulation.
- Chapter VI discusses the abstract industry's concerns with respect to state regulation of the abstract profession and its concern over deregulation.
- Chapter VII addresses a final question:
whether there is a less restrictive alternative method of regulation available which could adequately protect the public and what alternative forms of regulation are available.

- Scope of the Audit (page 4)
 - Addresses the need for state regulation
 - The audit focused upon the six questions in the sunset law and included an examination of board effectiveness.
 - The audit did not include a financial or compliance review.
- Chapter II - Background (page 5)
 - Abstracting is an American-born tradition that can be traced to colonial times. (page 5)
 - As land transactions became complicated, title searchers (abstracters) were used to prepare summaries (abstracts) of real property transactions.
- Evolution of regulation in Montana (page 5)
 - The Montana Abstracters Association was founded in 1909. (page 6)
 - The association authored 1915 legislation requiring abstracter bonding. (page 7)
 - The association authored 1931 legislation creating the board. (page 8)
 - In 1935 the state supreme court held that constitutionally the state may regulate the abstracting profession. (page 8)
 - The Executive Reorganization Act of 1971 attached the board administratively to the Department of Professional and Occupational Licensing.

- Board Organization, Staffing, Funding (page 9)
 - There are three board members who must be abstracters. The board is appointed by the Governor to serve three-year terms. (page 9)
 - The board is administratively supported by the Department of Professional and Occupational Licensing which uses one administrative secretary five percent of total time for board business. (page 10)
 - The board is financed through the earmarked revenue fund which is totally supported by abstracter licensing and examination fees. (page 10)
- Board Functions (page 10)
 - The board licenses abstract plants. (page 11)
 - Plants must have a complete set of abstract books--essentially all county land title records.
 - A plant must be in the charge of a licensed abstracter.
 - There were 65 licensed plants during fiscal year 1976-77.
 - The Board inspects abstract plants. (page 12)
 - New plants or plants to be sold are inspected.
 - Licensed plants are not spot-checked.
 - Three inspections during 1977.

- The board licenses individual abstracters.
(page 13)
 - Abstracters must pass an examination.
 - Abstracters must meet experience requirements.
 - There were 155 licensed abstracters during fiscal year 1977-78.
- Chapter III - The Relationship of State Regulation to Public Health, Safety or Welfare. (page 16)
 - Is there a reasonable relationship between the exercise of the state's police power and the protection of the public health, safety or welfare?
(page 16)
 - Title Insurance now replaces abstracts in most real estate transactions. (page 16)
 - The majority of abstract plants' business is title insurance--not abstract preparation.
(page 20)
 - Many lending institutions and mortgage buyers will not accept abstracts and specifically require title insurance. (page 21)
 - The state Insurance Department regulates title insurance. (page 26)
 - There is a nationwide trend away from abstract use--only 4 of 14 western states surveyed regulate abstracters. (page 29)

- Conclusion--there is no longer a reasonable relationship between the current exercise of the state's police power and the protection of the public health, safety or welfare.
- Would the absence of regulation significantly harm or endanger the public health, safety, or welfare?
(page 31)
 - One board objective is to license abstract plants. Twenty-five percent of all plants have never been inspected yet no discernible public harm was disclosed. (page 32)
 - Another board objective is to make sure abstract plants are properly maintained--only 18.5 percent of the plants have been inspected in the last five years and only 35 percent have been inspected in the last 10 years.
(page 32)
 - The board has never spot-checked on a plant. Still no public harm due to poor plant maintenance was evident. (page 33)
 - The board has never suspended or revoked an abstract plants' license. (page 33)
 - The final board objective is to license abstracters. One review disclosed that:
 - The same examination is used repeatedly and was last updated in 1974. (page 35)
 - The examination has not been evaluated.
(page 36)

- Licensed abstracters are not retested or required to maintain proficiency through continuing education. (page 36)
 - A problem of incompetent abstracters has not evolved. (page 38)
- Conclusion--The absence of regulation would not significantly harm or endanger the public safety or welfare. (page 39)
- Chapter IV - The Regulation Process
- Are all facets of the regulatory process designed solely for the purpose of, and have as their primary effect, the protection of the public?
(page 40)
 - Regulation was designed and advocated by the profession--not the public. (page 40)
 - The public has not participated in board decisions and operations. (page 41)
- No member of the public has ever attended board meetings and meetings are held only in Helena.
- The board has not adopted rules of public participation as required by law.
- There are no public members on the board--only abstracters and the board has taken no positive action to solicit public response.
- Conflicts exist between public duty and professional interests. (page 42)

- One board member is president of the Montana Land Title Association.
- The board chairman inspected one of his company's abstract plants and the board approved the license.
- The board chairman is president of a company which directly or indirectly has a financial interest in over 50 percent of all licensed abstract plants.
- The board overly restricts entry into the abstracting profession. (page 44)
- Conclusion--Certain aspects of the regulatory process are not designed solely to protect the public. (page 45)

Chapter V - Cost Considerations

Does the regulation have the effect of directly or indirectly increasing the cost of goods or services? (page 46)

Economically, the abstracting profession is termed an oligopolistic market. (page 46)

- There are few sellers in the marketplace.
- Limited competition exists.
- The market is caused by the limited demand for abstracting services--not state regulation.

- Regulation causes a minimal increase in costs. (page 48)
 - A substitute service--title insurance--is being used in place of abstracts usually at a lower cost to the consumer. (page 54)
 - Is the increase in costs more harmful to the public than the harm which could result from the absence of regulation? (page 54)
 - The comparison of Montana abstract costs to the costs in states that do not regulate revealed no significant difference.
 - If the abstract profession were deregulated, consumers would still use title insurance in most real estate transactions--the trend would continue.
 - Conclusion--Deregulation would not increase costs. (page 55)
- Chapter VI - Concerns Expressed by the Profession
 - Inadequate abstracts will be prepared. (page 57)
 - Plants will not be properly maintained. (page 58)
 - Prices will increase. (page 59)

We address the various concerns by pointing to previous sections of the report as evidence to show the concerns are not warranted. In general, the profession has not been subjected to intensive regulation yet the concerns have not evolved into problems. (pages 57-60)

Chapter VII - Less Restrictive Regulation Alternatives--

Is there another less restrictive method of regulation available which could adequately protect the public?

(page 61)

The degree of state regulation needed must be matched against the potential for consumer harm.

(page 61)

If consumer harm could be death or injury, state involvement and regulation is needed.

If the consumer could only suffer discomfort or otherwise be protected, state involvement and regulation is not needed.

Consumer harm resulting from an incorrect abstract is not a life or death issue, but it is a financial loss (property) which could be reversed through liability insurance, lawsuit, etcetera. (page 62)

In determining the degree of state regulation needed, this audit identified nine alternatives which could be used to protect the public. (page 64)

The alternatives range from the most extreme or restrictive--the present system of regulation--to the least restrictive--no licensing or regulation.

Conclusion--The Montana sunset law (Section 82-4603(1)(a), R.C.M. 1947), terminates the Board of Abstracters on July 1, 1979. Under the law (Section 82-4604, R.C.M. 1947), a performance audit of the Board of Abstracters must be conducted prior to termination. This performance audit disclosed that there is a questionable need for the present system of state regulation of the abstracting industry in Montana and that there are a number of less restrictive alternative forms of regulation available including no regulation whatsoever by state government. (page 69)

Chapter I

INTRODUCTION

This sunset performance audit addresses the need for state regulation of the abstracting profession by the Board of Abstracters--a state board within the Department of Professional and Occupational Licensing. The Board of Abstracters (hereinafter referred to as the board) is responsible for the licensing and regulation of abstracters and abstract businesses in Montana. An abstract is a summary of publicly recorded documents depicting the chain of ownership and other events affecting the title to real property. Licensed abstracters and abstract businesses prepare such abstracts.

REPORT OBJECTIVES

The 1977 Legislature passed a law terminating numerous regulatory boards and agencies, including the Board of Abstracters. This law is commonly referred to as the "sunset law." The "sunset law" requires the Legislative Audit Committee to conduct a performance audit of each terminated agency. The performance audit must review the need for each regulatory board/agency and the Legislative Audit Committee must offer recommendations for board/agency reestablishment, modification, or termination.

In defining legislative intent, Section 1 of the sunset law states that, by requiring periodic evaluation in the form of a performance audit, the legislature will be in a better position to ensure that agencies and programs exist only to be responsive to state citizens' needs. The sunset law terminates the board on

July 1, 1979. This performance audit is in response to the legal requirement for review prior to board termination.

REPORT ORGANIZATION

The sunset law requires a thorough examination of the following questions during the conduct of the performance audit:

- "(a) Would the absence of regulation significantly harm or endanger the public health, safety, or welfare?
- (b) Is there a reasonable relationship between the exercise of the state's police power and the protection of the public health, safety, or welfare?
- (c) Is there another less restrictive method of regulation available which could adequately protect the public?
- (d) Does the regulation have the effect of directly or indirectly increasing the costs of any goods or services involved and, if so, to what degree?
- (e) Is the increase in cost more harmful to the public than the harm which could result from the absence of regulation?
- (f) Are all facets of the regulatory process designed solely for the purpose of and have as their primary effect the protection of the public?"¹

The report focuses on these questions.

Chapter I is introductory. It summarizes the objectives, organization, and scope of the report.

Chapter II presents background information about the evolution of the abstracting profession. Included in this background information is a history of the board and the profession and details on board organization, staffing, funding, and objectives.

Chapter III addresses two of the questions as required in the sunset law. The first question is whether there is a reasonable relationship between the exercise of the state's police power to regulate the abstract profession and the protection of the public health, safety, or welfare. To answer this question

¹ Senate Bill 162, Chapter 562, Laws of Montana, 1977, and codified as Title 82, Chapter 46, R.C.M. 1947.

we examine changes in the title abstracting profession and analyze the use of abstracts in Montana by lending institutions and consumers.

The second question addressed in Chapter III is whether the absence of regulation of abstracters would harm the public. To answer this we review the relevancy of the abstract law and analyze the effectiveness of current regulation by the board.

Chapter IV addresses another question posed by the sunset law: Whether all facets of the regulatory process are designed solely for public protection? The chapter reviews the initial events surrounding the establishment of the abstract regulation law in Montana, the extent to which the public has participated in board decisions and actions, and the relationship between the professional associations of Montana abstracters and the Board of Abstracters. Board regulation of entry into the abstracting profession is also reviewed.

Chapter V addresses two questions of the sunset law. That is: Whether state regulation of the abstract profession has the effect of directly or indirectly increasing costs to the public? Whether such increase is more harmful than the harm which could result from the absence of regulation?

Chapter VI discusses the abstract industry's concerns with respect to state regulation of the abstract profession and its concern over deregulation.

Chapter VII addresses the final question of the sunset law: Whether there is a less restrictive alternative method of regulation

available which could adequately protect the public? The possible alternative forms of regulation are discussed as they relate to the regulation of the abstracting profession in Montana.

SCOPE OF THE AUDIT

This sunset performance audit primarily addresses the need for state regulation of the abstracters' profession. It focuses upon the six questions posed in the sunset law and includes an examination into the effectiveness of the operations of the board. It does not encompass a review of the financial transactions of the board or the board's overall compliance with state laws.

Chapter II

BACKGROUND

EVOLUTION OF ABSTRACT REGULATION IN MONTANA

Prior to the eleventh century in Europe, individuals possessing and inhabiting land were recognized as the only rightful property owners. Ownership usually remained vested with the family, passing to the eldest son of each successive generation. Property could be taken by force, sold, or given away with little or no documentation of the transaction.

During the eleventh century in England, a system of written tax records was developed. The King retained title to property, yet granted limited land possession rights to his subjects in return for rent. The rent was recorded in the "Doomsday Book" which became the land records source as well as the source of considerable scorn among taxpaying subjects. When the English Feudal System was abolished, land title records were lost and property title was again determined by possession.

In 1640 the Massachusetts Colony adopted a land title documentation and recordation system. Abstracting and title search is therefore considered an American-born profession. As documents became numerous, summaries or "abstracts" of important transactions and documents were prepared by respected officials in the colony. Land became a more valuable commodity and "statehood" brought with it the specialized business of title search. Title searchers kept copies of relevant documents and prepared abstracts of these documents for interested parties. As time

passed, property transactions became more complicated and attorneys were requested to interpret the legal significance of abstracts. The attorneys reviewed the title searcher's work or prepared their own abstracts from public records. An attorney's opinion of the condition of the title was then offered. The purchaser and lender considered themselves protected if the attorney could not discover any facts which would impair the title to the property.

During the late nineteenth century, western states began to pass laws regulating the abstract profession. In 1887, Nebraska enacted legislation requiring abstracters to file a \$10,000 bond with the state. The bond was to be used in the case of errors or deficiencies in the abstract causing subsequent monetary damage to a state citizen.

North Dakota in 1889, Wyoming in 1891, and Idaho in 1897, passed similar bonding requirements. The Wyoming law was the first to require the abstracter to maintain his own real estate records.

In early 1909 a Missoula abstracter requested that Montana abstracters attend an organizational meeting in Helena. On February 15, 1909, ten abstracters met and adopted a constitution creating the Montana Abstracters Association. The stated purpose of the association was to distribute information of mutual value to the membership and facilitate protection against "dangers and difficulties" with the abstract business.¹ The association, now

¹ W.B. Clark, The Montana Title Association In Its Fiftieth Year, 1909-1959, presented at the 1958 Golden Anniversary Convention of the Montana Title Association, August 1 and 2, 1958.

known as the Montana Land Title Association, was an activating force in the introduction and passage of legislation regulating abstracting in Montana.

The association discussed the bonding of abstracters during the initial organizational meeting in 1909, but no action was taken. The association also discussed bonding at subsequent meetings and bonding legislation was finally introduced during the 1915 session. The bonding bill passed as Chapter 43 of the 1915 Session Laws and represents the first regulation of Montana abstracters. The bonding requirement of the law was similar to the Nebraska law of 1887, but further provided that the state of Montana would not become involved in abstract price regulation.

During the 1920's, the American Land Title Association urged state abstract associations "to get busy and work for the passage of a law that would protect them from curbstone competition...."¹ In 1925 North Dakota revised its laws and became the first state with an abstracter's licensing act. The North Dakota law was modified slightly and adopted as the Model Abstracters' License Act by the American Land Title Association in June of 1928. In 1929 South Dakota and Colorado adopted variations of the Model Abstracters' License Act.

In early 1929 the Montana Abstracters Association used the North Dakota law and the American Land Title Association's Model Act to develop and introduce House Bill 100. The bill would have licensed abstract plants and individual abstracters. At the

¹ See footnote on page 6.

request of the association, House Bill 100 was introduced by a legislator/abstracter from Carter County and it successfully passed the House. The Montana Abstracters Association lobbied in support of the bill but it died in the Senate Judiciary Committee.

Between March 1929 to January 1931, the Montana Abstracters Association revised the previously defeated House Bill 100. On January 29, 1931, the proposed licensing law was re-introduced at the request of the association as Senate Bill 31 by a legislator/abstracter from Lincoln County.

Senate Bill 31, enacted as Chapter 105 of the 1931 Session Laws, provided for a Montana State Board of Abstract Examiners charged with the licensing of abstract businesses as well as abstracters. Montana law was considered innovative. It represented the first legislation requiring an abstract business to have and maintain adequate abstract records before it could operate and be licensed.

In 1935 the constitutionality of the "Abstracters' Law" was challenged in district court in Helena. Action was brought by an individual who wanted to compel the board to issue a certificate of authority without his compliance with the recordkeeping requirement of the law. The district judge denied the individual a right to abstract without his compliance with the laws as administered by the board. The individual appealed and the Montana Supreme Court upheld the decision of the district court. In upholding the district court's decision, the Supreme Court did not address the need for state regulation of abstracters, but stated that, "Under its police power the state may regulate a

business or profession when such regulation appears necessary for the general welfare of the people."¹

The laws requiring state regulation of abstracters are codified as Title 66, Chapter 21, Revised Codes of Montana, 1947. The law has remained essentially the same since passed in 1931.

BOARD'S ORGANIZATION, STAFFING, FUNDING

Formerly called the Abstracter's Board of Examiners, the Executive Reorganization Act of 1971 changed the name to the Board of Abstracters and attached the board to the Department of Professional and Occupational Licensing for administrative purposes. The board consists of three members appointed by the Governor for three-year terms. Board members must be from different counties and each must be a registered abstracter during his appointed term. Board members may be reappointed.

The board elects officers each fiscal year. The board may compel the attendance of witnesses and the chairman and secretary may administer oaths. Under the laws of the state of Montana the board may formulate rules and regulations necessary for the proper administration of abstract regulation in Montana.

The board meets in Helena in May and October to give examinations to qualified applicants. Plant inspection meetings are called by the board chairman as the need arises. Board members receive \$25 per day compensation plus travel expenses while attending board meetings or when otherwise engaged in board-connected business.

¹ Freeman v. Abstracters Board of Examiners, 45 P.2d 668.

The board is administratively supported by the Department of Professional and Occupational Licensing. The department used one person only 5 percent of available time during fiscal year 1976-77 to accomplish the board's administrative tasks. There is no anticipated staffing increase budgeted over the next biennium.

The board is funded totally through an account in the earmarked revenue fund. The board is supported by examination and licensing fees paid by individual abstracters and by abstract businesses. Appropriations for fiscal years 1977-78 and 1978-79 are \$2,569 and \$2,684 respectively. Illustration 2-1 details the financial history of the board from fiscal year 1971-72 to fiscal year 1976-77.

BOARD OF ABSTRACTERS
FINANCIAL HISTORY

<u>Fiscal Year</u>	<u>*Revenues</u>	<u>*Expenditures</u>	<u>Fiscal Year-End Fund Balance</u>
1976-77	\$4,026	\$2,878	\$2,521
1975-76	3,934	3,612	1,373
1974-75	1,720	1,455	1,051
1973-74	1,097	1,091	786
1972-73	1,211	1,344	780
1971-72	Not Available	1,977	Not Available

*Includes license and examination fees as well as money received and spent for plant inspections but not included in appropriations. This problem is addressed in a separate letter report.

Source: Compiled by the Office of the Legislative Auditor.

Illustration 2-1

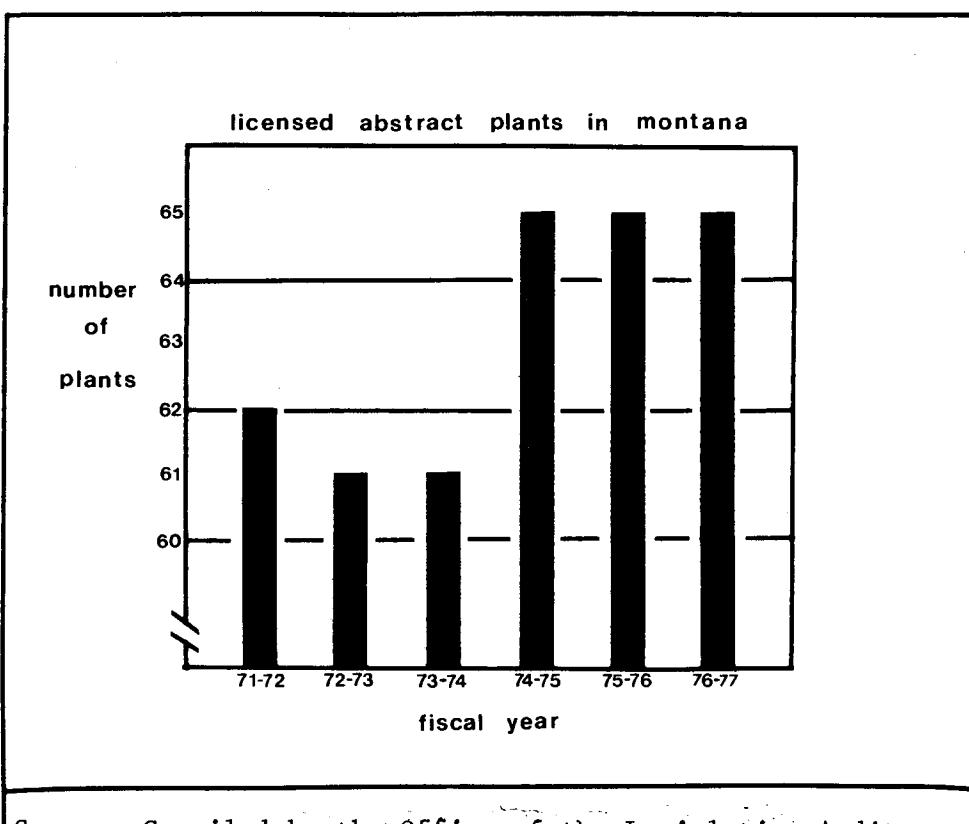
BOARD'S OBJECTIVES AND OPERATIONS

The sunset law required each board/agency under review during this biennium to delineate their respective goals and objectives

by September 1, 1977. The sunset law also requires each board/agency to link expenditures to anticipated program outcome and program objectives. The board did not do this. Rather, the director of the Department of Professional and Occupational Licensing reported the goal of the Board of Abstracters as the assurance of "public safety and welfare against incorrect abstract of title." The director said that the board's objectives are to license abstract businesses, to assure that the businesses are properly maintained, and to license abstracters. We questioned members of the board about the goals and objectives reported by the director and board members concur with his statements.

In order for an abstract business to operate in Montana, it must be licensed by the board--the first objective of the board. An abstract business is commonly referred to as an abstract plant. The plant must maintain a complete set of abstract books and be in the charge of a licensed abstracter. Upon satisfying this requirement, the plant makes application to the board for a "Certificate of Authority." Board members then complete a "take-off" (a random sample of the county courthouse public records), and inspect the applicant's plant to determine if these "take-off" documents are properly on file and correctly indexed. Once certified, the abstract plant may renew the certificate of authority each year upon payment of an annual license fee.

During fiscal year 1976-77, there were 65 abstract plants holding certificates of authority. Certificates of authority issued over the last six fiscal years are shown in illustration 2-2.



Source: Compiled by the Office of the Legislative Auditor

Illustration 2-2

An abstract plant must have copies of essentially all county records affecting title to real estate. In order to accomplish this, a plant must be continually updated. Many plants send a representative to the county courthouse each day to record and copy the preceding day's transactions--documents, liens, and other information affecting ownership of property in the county. Other plants purchase microfilm copies of documents filed in the courthouse.

The board has as another primary objective the assurance that abstract plants are properly maintained. To accomplish this objective, the board inspects abstract plants which are about to be sold. The inspection of such a plant is exactly the same

as the inspection of a new plant. A "take-off" of county records is completed and any deficiencies are noted to the new or prospective owners. The number of plant inspections completed during the last six calendar years appears in illustration 2-3.

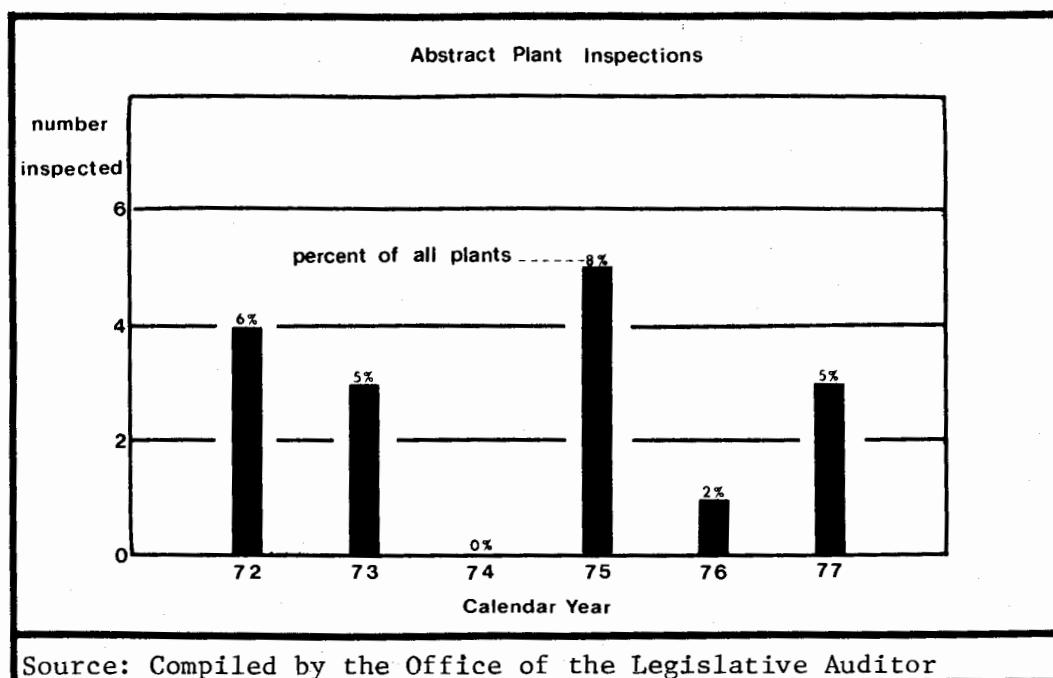


Illustration 2-3

The final reported objective of the board is to license abstracters in Montana. As noted earlier, each abstract plant must be in the charge of a licensed abstracter. To hold a license (referred to as a Certificate of Registration), an individual must first have three years of experience in a licensed abstract plant. Four years experience outside of Montana is acceptable if the applicant has worked at least one additional year in a Montana plant. Consequently, an applicant from out of state must have five years of experience. The applicant must then pass a standard examination which is compiled, monitored,

and graded by board members. During the last six fiscal years, 44 examinations were given with an average of 86 percent of the examinees passing each year. (See illustration 2-4).

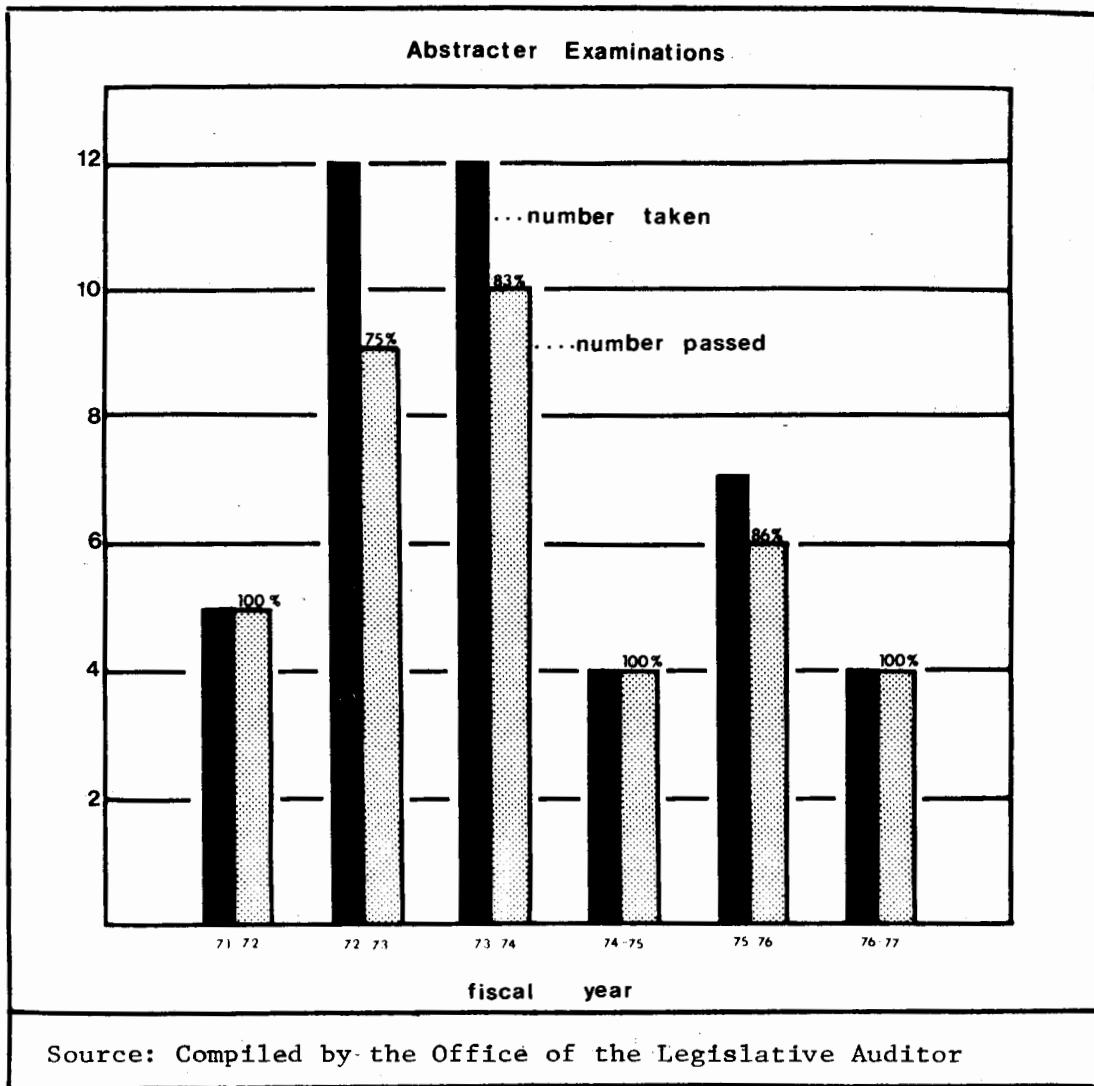


Illustration 2-4

Illustration 2-5 summarizes all licenses issued by the board during the last six fiscal years. The figures include individuals licensed prior to fiscal year 1971-72 as well as those passing the examination during fiscal years 1971-72 to 1976-77.

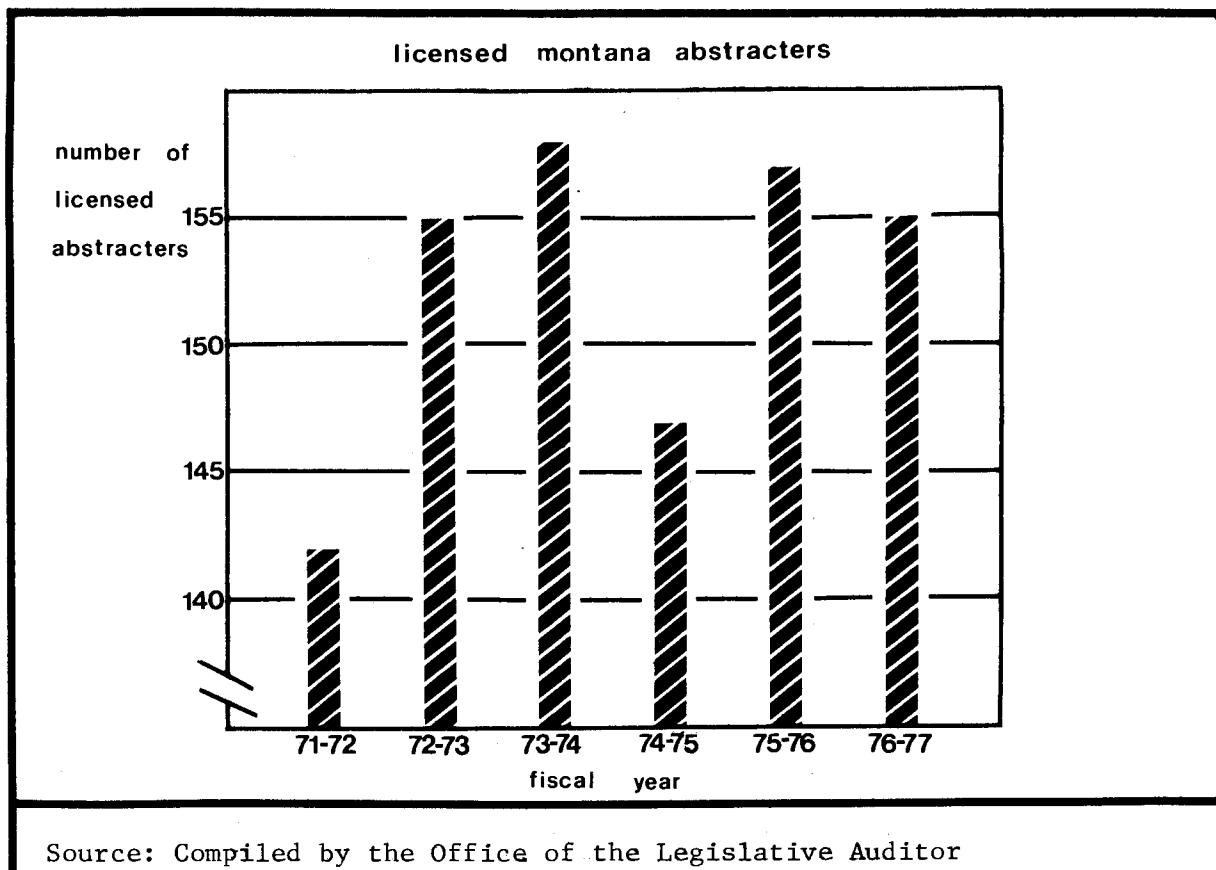


Illustration 2-5

In summary, the Board of Abstracters was created in 1931 to regulate the abstracting profession. The board licenses individual abstracters through an examination process. The board also inspects and licenses abstract plants. Board regulation is financed through an account in the earmarked revenue fund which is totally supported through examination, license, and inspection fees.

Chapter III

THE RELATIONSHIP of STATE REGULATION to PUBLIC HEALTH, SAFETY, or WELFARE

This chapter addresses two questions posed by the sunset law: Is there a reasonable relationship between the exercise of the state's police power and the protection of the public health, safety, or welfare? Would the absence of regulation significantly harm or endanger the public health, safety, or welfare? In defining the purpose of sunset legislation, Montana's sunset law (Section 82-4601, et seq., R.C.M. 1947), states that "The legislature questions whether conditions causing the establishment of these agencies, programs, and rules have not changed to such an extent as to remove the need for some or all of the agencies, programs, and rules."

CHANGES IN THE PROFESSION

At the time of the board's creation in 1931, an abstract and attorney's opinion on that abstract were the principal means of title protection used by the consumer. Discussions with abstracters revealed that title insurance, introduced in Montana during the 1940s, now replaces abstracts in many real estate transactions. Because of the apparent trend away from abstract use, we reviewed the nature and purpose of title insurance. We then investigated the use of abstracts and title insurance in Montana.

Title insurance insures against defects of title. "Title insurance is an agreement whereby an insurer for a valuable consideration agrees to indemnify the insured in a specific

amount against loss or defects in title to real estate or liens or encumbrances."¹ The title insurance premium is paid only at the time of purchase but the policy remains in effect until property ownership changes. The purpose of title insurance is risk elimination as well as risk assumption. The title insurance company assumes the risk of property loss through monetary indemnification in the event that such losses occur. The purchaser is protected financially in the amount of the policy. In addition, the title insurance company assumes the costs of court and attorneys' fees should title action be brought to court.

Title insurance also serves as a risk elimination process for the consumer. The title insurance company or its agent, before issuing the policy, performs a search of the public record to disclose any facts which would impair property title. The search eliminates most of the risk on the company's behalf and, by the nature of the search process, provides the consumer with reasonable assurance that the title is clear. The title search for title insurance is similar to the search used during compilation of the abstract by abstracters. In both cases, the public record is reviewed and any document affecting property title is noted. In the case of an abstract, each document is copied or summarized by an abstracter for the attorney. In contrast, the title insurance search process requires formal documentation of all property events but only to the extent deemed necessary by the title insurance company. During a title insurance search

¹ Milton N. Lieberman, New Jersey Practice, Volume 13, "Abstracts and Titles," Soney and Sage Company, 1966.

documents are reviewed and analyzed by company experts in order to protect the company from unnecessary risk. (The title searchers may be licensed abstracters.) If the title is unclear, the company will not insure the property or will insure it with certain expressed and written exceptions; hence, the prospective purchaser is notified of the title clarity problem prior to culmination of property purchase.

The American Land Title Association is a professional association which represents abstracters as well as title insurance agents, title insurance underwriters, and others connected with land title assurance. In its publication, "Get the Most for Your Money When You Buy a Home," the association points to inherent drawbacks of abstracts. The publication states that, "After an abstract has been prepared by a reliable abstracter, and certified so that the buyer or mortgagee can rely upon it, it should be delivered to an attorney for examination. The attorney will thereupon examine the abstract and prepare his opinion as to the title, which will show the name of the titleholder and all defects and encumbrances disclosed by the abstract. Unfortunately, no examination of the title, no matter how complete or how expressly accomplished, can protect a purchaser or lender against hidden risks--those defects which do not appear in the public record."¹

The Lawyers' Title Insurance Corporation, a major title insurance underwriter, has identified 15 title defects and

¹ American Land Title Association, "Get the Most for Your Money When You Buy a Home," Washington, D.C., no publication date.

compared consumer coverage of the defects by abstract, attorney's opinion, and title insurance. The comparison appears in illustration 3-1.

Comparison of coverage by:	SURVEYOR'S ERRORS	FRAUD AND FORGERY	EXPIRED POWERS OF ATTORNEY	FALSE PERSONATIONS	PARTNERS' OVERSIGHTS	FILING ERRORS	OVERSIGHTS OUTLAWED	MISSING HEIRS	UNPROBATED WILLS	DEEDS BY MINORS	INDEXING ERRORS	DEEDS OF UNOUND MIND	SECRET HIRINGS	UNDISCLOSED DISLOCES	FALSEIFICATION OF RECORDS	BIRTH AFTER WILL DATE
Abstracts			X													
Attorney's Opinion				X												
Title Insurance	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X

Source: Adapted from a table contained in "Abstract Certificate, Opinions, Title Insurance: What Difference Does It Make?", Lawyers' Title Insurance Corporation, Revised 5-1969.

Illustration 3-1

Title insurance records on file at the Montana Insurance Commissioner's Office indicate 64 of 65 licensed Montana abstract plants are also licensed by the Insurance Commissioner to sell title insurance. To measure the use of title insurance as opposed to abstracts, we asked the Department of Professional and Occupational Licensing to survey licensed abstract plants: 59 of 65 plants provided information about the extent to which title insurance is used in their respective operations. Five firms reported that their business is 100 percent title insurance and abstracts are no longer prepared. Thirty-two firms reported that at least 75 percent of their business is title insurance. Fifty-five of 59 firms reported that the majority of their business was title insurance with only four firms reporting that their business is primarily abstract preparation. Based upon an average of

the responses, 73 percent of the licensed abstract plants' business of title assurance was done through title insurance. The results of the survey appear in illustration 3-2.

To obtain additional information about the trend to title insurance and from abstracts, we distributed a survey to abstracters attending the 1977 Annual Convention of the Montana Land Title Association.

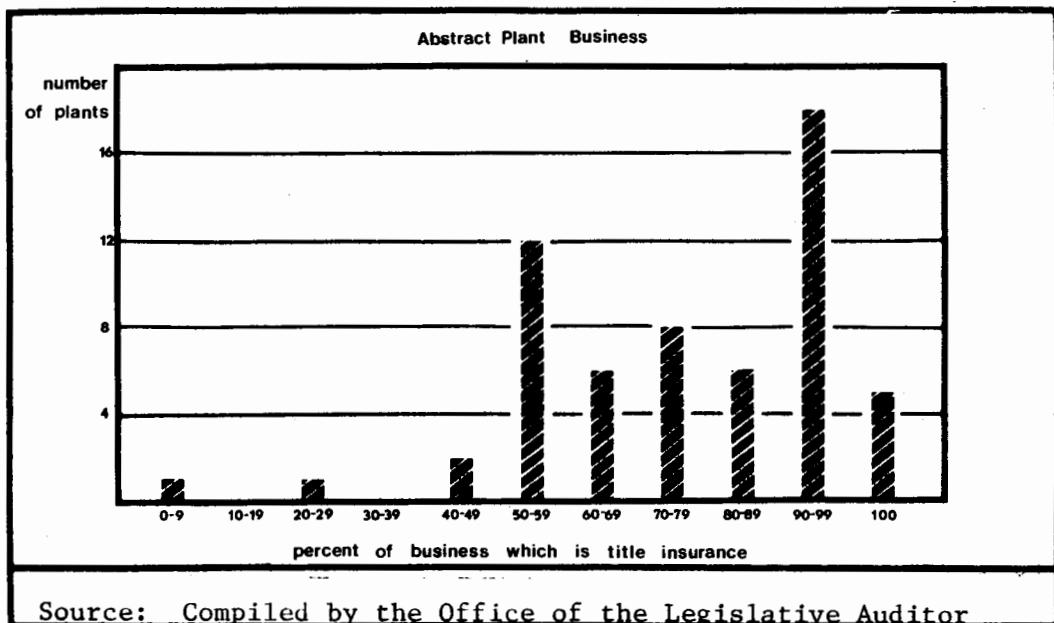


Illustration 3-2

Forty-seven surveys were distributed and 31 were returned to the Office of the Legislative Auditor.¹ We asked the abstracters if there was a trend towards title insurance and away from abstracts. Ninety-seven percent of the respondents confirmed the trend in Montana towards title insurance. We asked the abstracters which provides the most consumer protection, abstracts or title insurance?

¹ For a complete analysis of survey responses, see Appendix I.

Ninety-five percent of the respondents said title insurance provides the most consumer protection.

While consumers--the purchasers of real property--are the ultimate users and beneficiaries of abstracts and title insurance, mortgage lending institutions such as banks, savings and loan companies, etcetera, create the primary demand for title assurance due to loan agreement stipulations.¹ In order to assess the use of title insurance versus abstracts, we surveyed abstracters to determine if mortgage lending institutions require title insurance or abstracts. Seventy-seven percent of the respondents stated that lending institutions now expressly require title insurance. To obtain more conclusive evidence about the apparent extensive use of title insurance and non-acceptance of abstracts, we surveyed lending institutions financing consumer purchases of real estate in Montana. Our random sample of banks disclosed that over 40 percent of the banks had specific policies requiring title insurance--they would not accept abstracts. The remaining banks accepted abstracts but the majority of their mortgages were secured by title insurance. In other words, while banks deal directly with abstracters, they are primarily using title insurance services, not abstracts. The results of the survey appear in illustration 3-3.

¹ The consumer purchases a title insurance policy normally in the amount of the purchase price. The consumer also pays for a title insurance policy covering the lending institution for the amount of the loan or mortgage.

Random Survey of Banks

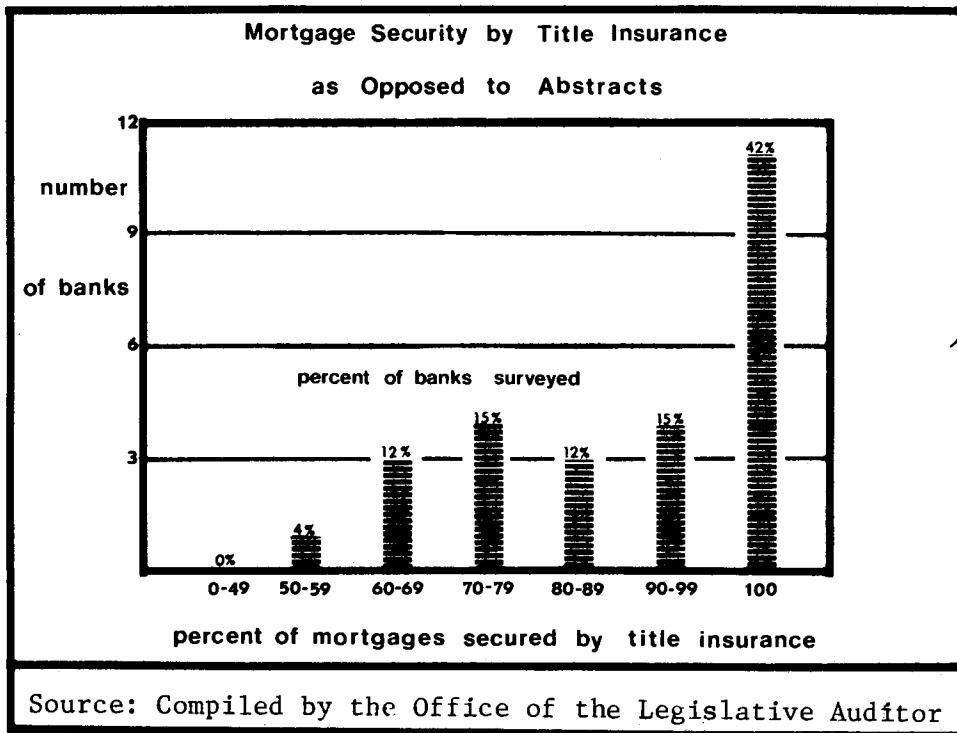


Illustration 3-3

In order to determine what the Montana Bankers' Association's view was of abstracts versus title insurance we contacted the association. The association was the only interested party we contacted that favored continuation of the Board of Abstracters. The chairman of the association's Real Estate Finance and Housing Committee advised us that the Montana Bankers' Association was "In favor of the retention of the Montana Board of Abstracters- because of our close involvement with abstracting firms." Based on the results of our survey described above, it appears that the "close involvement" the association mentioned was due to banks using title insurance services offered by abstracters.

We also discussed the trend towards title insurance with officials representing the Montana Savings and Loan League. We specifically asked the league for an opinion regarding possible deregulation of abstracting. The league replied in a letter that "The members of the league really have no opinion, which means actually no commitment." We spoke with the secretary-treasurer of the Montana Savings and Loan League. He indicated that the intent of the letter representing the league's opinion was one of no preference in either direction--for or against deregulation of abstracting.

The Federal Land Bank finances agricultural land purchases in Montana. We contacted officials in the Great Falls Land Bank office and were informed that the Federal Land Bank requires title insurance on agricultural purchases in Montana. The regional office in Spokane establishes Montana's lending policy and the senior attorney with that office advised us that, "The Federal Land Bank of Spokane requires the issuance of title insurance on each and every loan in the state of Montana."

Montana Livestock Production Credit Association (PCA) offices throughout the state, finance agricultural operations. When operating loans are secured with first or second real estate mortgages, the Helena PCA office manager noted that all new mortgages used as loan collateral are secured with title insurance; and, his office had not used abstracts for ten years.

Our review disclosed that numerous state and federal agencies also require title insurance and will not accept abstracts.

These agencies are involved in the secondary mortgage market--the sale and purchase of existing mortgages. The Housing Division of the state Department of Administration purchases Federal Housing Administration's and U.S. Veterans Administration's guaranteed mortgages through lending institutions in Montana. Over \$51 million in such mortgages have been purchased from 54 separate Montana lending institutions. Each lending institution is required to sign a "Mortgage Purchase Agreement" which specifically calls for title insurance covering each mortgage. The Housing Division will not accept abstracts.

The state Board of Investments also purchases mortgages. Title insurance is specifically required in the "Sale and Servicing Agreement" which all mortgage sellers must sign. As of August 1977, the Board of Investments owned approximately \$50 million in Montana mortgages, all secured by title insurance. Abstracts are not accepted by the Board of Investments.

The State Capitol Employees Credit Union finances real estate purchases. The manager of the credit union advised us that all real estate financing by the credit union has been secured with title insurance.

Finally, the Federal National Mortgage Association (FNMA) is organized under the U.S. Department of Housing and Urban Development to purchase mortgages of home and building project loans. We contacted the FNMA regional office governing 11 western states including Montana regarding the acceptability of abstracts. In correspondence with the Office of the Legislative Auditor, the Regional Counsel stated, "No mortgage having an abstract

title as its title evidence has been acceptable for purchase in this region for more than 16 years." As of June 30, 1977 the Federal National Mortgage Association owned 2,552 mortgages in Montana totaling over \$87 million. All mortgages held by FNMA are secured by title insurance.

There is no question that the use of title insurance in Montana is increasing. Many lending institutions, state agencies, and federal agencies now require title insurance and will not accept abstracts. The Real Estate Title Insurance Study Commission, in its March 1974 report to the New Jersey State Legislature, noted that "Title Insurance--once a rarity in real estate sales prior to World War II--is virtually mandatory today."¹ That this is the case was confirmed by our interview with the chairman of the Title Insurance and Underwriters Section of the American Land Title Association. He confirmed that there is a nationwide trend towards title insurance and away from abstracts.

The trend in Montana towards title insurance is logical. With an abstract the consumer receives an attorney's assurance of clear title. With title insurance the consumer receives assurance of clear title plus insurance (monetary protection) if the title is subsequently questioned. The merits of one over the other are obvious. If a property title problem materializes under title insurance all the consumer has to do is prove insurance coverage and loss and file an insurance claim. But if the insurance company refuses to pay, litigation may be required to

¹ Real Estate Title Insurance Study Commission, State of New Jersey, "Report to the Legislature," March 1974, p. 16.

recover losses. In contrast, an abstract protects the consumer only on the basis of an attorney's opinion of that abstract. If the attorney were to leave the state, retire, or even die, the consumer would have little recourse if his property title were subsequently questioned. Even if the attorney were available, the consumer would have to seek restitution from the attorney and/or abstracter or sue at his own expense and prove negligence by the attorney and/or the abstracter.

The State Insurance Commissioner is charged with the responsibility of regulating the title insurance industry. Title insurance rates are filed with the Insurance Commissioner's Office. Title insurance underwriters must be licensed by the commissioner. Title insurance agents must be sponsored by an underwriter and agents are also licensed by the Insurance Commissioner's Office. In this regard, regulation of the title insurance industry will be addressed in the sunset performance audit of the Insurance Commissioner's Office currently in progress.

PRESENT ABSTRACT USE

Even though many lending institutions and governmental agencies will not accept abstracts, Montana abstract plants reported that abstracts are still being used on a limited basis.

Our review disclosed that the Montana general public uses abstracts only in certain confined situations. If an existing abstract (usually held by the seller), has already been prepared on a piece of property it may be sometimes less expensive for that abstract to be updated than it would be to purchase title insurance. Our interviews with abstracters and lending officers

disclosed that title insurance is often less expensive if new abstract preparation is required. For example, an existing abstract might cover a five-acre tract. If the tract were divided into five parcels and purchased by five different consumers on different occasions, only one consumer would probably be able to use the existing abstract and have it updated. Title insurance would be less expensive for the four other consumers and the one consumer with the abstract would have it updated only if the cost were less than the title insurance premium. On the other hand, some agricultural tracts in Montana pass from generation to generation with few property title transactions. In this case, it is sometimes less expensive to use an abstract since extensive title research and documentation may not be necessary.

While there are some instances where the general public still uses abstracts, as noted above, most present day users of abstracts are corporations concerned with easements, oil and gas rights, mineral rights, water rights, and similar subsurface considerations. Primary users of abstracts in Montana include oil companies, power companies, mining companies, telephone companies, and a federal agency responsible for forest land acquisition and control. Oil companies do not use standard abstracts in the customary sense, i.e., with an independent attorney's opinion, but rather seek verbatim copies of all documents affecting title and subsurface rights. An abstracter gives them these copies and then oil companies have their own attorneys review the documents forming their own opinion on the ownership history of the property. In this regard, one Montana

abstract firm has specialized in the preparation of abstracts for oil companies; however, this firm is not licensed by the board.

(This is discussed further on page 34.)

We contacted the manager of the Land Department of the major power company operating in the state and learned that the Land Department recently persuaded its legal counsel to begin accepting title insurance in lieu of abstracts. The manager noted that title insurance is less expensive and faster to obtain. The major mining company operating in the state also uses abstracts but they are not prepared by abstract plants. Instead, the company employs its own abstracter who maintains an office at the company and also at one county clerk and recorder's office. Company lawyers review the abstracts. The major telephone utility company also uses abstracts but employs its own title examiners and uses its own internal legal staff. Federal officials in Helena responsible for national forest land acquisition advised us that, while abstracts are sometimes used, title insurance is always purchased in conjunction with the abstract.

Representatives of the Montana Land Title Association noted that abstract work is being completed for land subdividers. While the law (Section 11-3865, R.C.M. 1947) requires abstracts or title insurance for the filing of subdivision plats, the law does not specifically address the question of which type of title assurance is better, leaving the decision to the subdivider.

In summary, abstracts are used on a very limited basis by the general public. Licensed abstract plants are providing title assurance predominantly in the form of title insurance, not

abstracts. The limited preparation of new abstracts is being done for corporations, not the general public. The general public uses abstracts only when abstracts are already available and can be updated at a cost savings to the consumer. On the other hand, the corporations using abstracts are not necessarily using the abstract summaries themselves, but rather are using verbatim copies of all documents affecting title to the property in question.

WESTERN STATES' REGULATION OF ABSTRACTERS

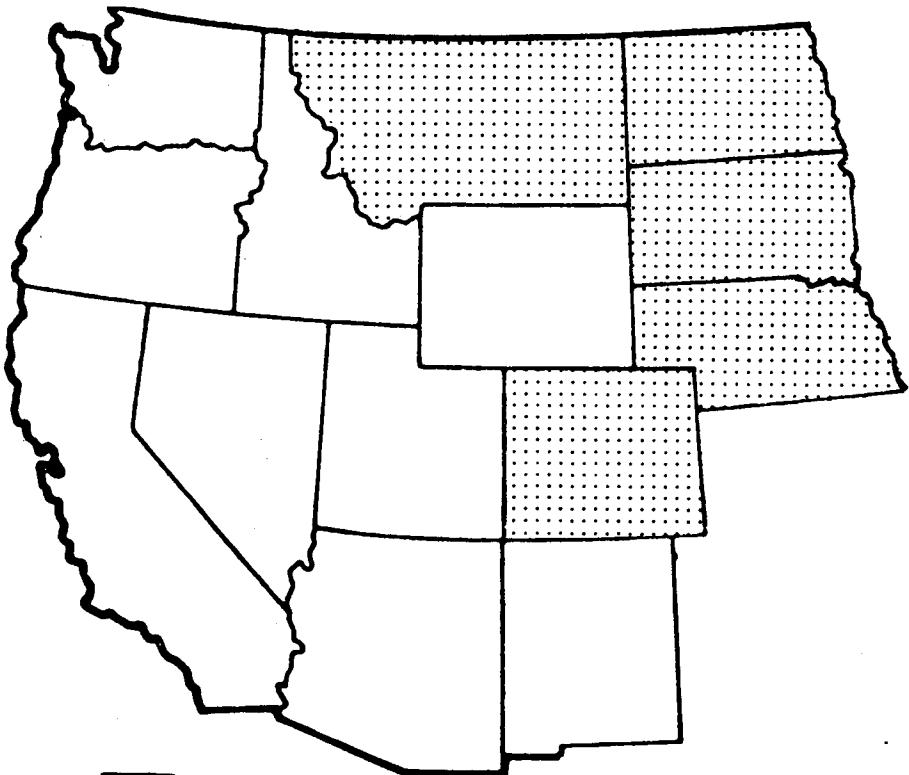
A 1964 publication by the Council of State Governments noted that four of 13 western states licensed and regulated abstracters.¹ In 1968 the Council of State Governments surveyed 46 states, Puerto Rico, and the Virgin Islands to determine which occupations were licensed by the states. The survey disclosed that 16 states regulated abstracters.² Specific degrees of regulation were not disclosed by the studies and there is reason to believe the data is somewhat obsolete and inaccurate. Consequently, a compilation of the nature and existence of abstracter regulation on a state by state basis is not available.

Since more timely information was not available, we conducted telephone interviews with abstracters and state land title association officials in 14 western states. A summary of our analysis appears in illustration 3-4.

¹ The Council of State Governments, "Professional and Occupational Licensing in the West," August 1964, MS-26.

² The Council of State Governments, "Occupations and Professions Licensed by the States, Puerto Rico and the Virgin Islands," December 1968, RM-422.

Western Regulation of Abstracters



Source: Compiled by the Office of the Legislative Auditor.

Illustration 3-4

As depicted above, five of 14 states regulate the abstracting profession through a state agency or board. Officials in each state indicated that the use of abstracts was declining and the use of title insurance was increasing--the same trend that exists in Montana. All states regulated title insurance by a state insurance agency or insurance commissioner. Utah was the only state we could identify that formerly regulated the abstracting profession but recently terminated its board of abstract examiners.

The president of the Utah Land Title Association said the board was terminated because it was believed the board restricted entry into the profession.

REGULATION OF ABSTRACT PLANTS

The stated goal of the board is to protect the public from incorrect abstract of title. With respect to abstract plants, the board's specific objectives include the licensing and monitoring of abstract plants' operations. As earlier noted, abstract plants are inspected only when they are new and are applying for a certificate of authority to conduct business in one of Montana's 56 counties or when they undergo a change in ownership. Other than in these two instances, abstract plants are never inspected. In this regard, the board advised us that while they acknowledged that the board had authority for more intensive regulation, they viewed their responsibility in the past as "licensing" rather than "regulation."

The inspections of new abstract plants take from one to two days and are conducted by at least two and sometimes all three board members. Board members go to the county in which the new plant proposes to do business. A "take-off" sample of documents affecting property ownership including mortgages, deeds, tax and mechanics' liens, etcetera, are selected by the board. These documents are tested against the new abstract plant's files. In other words, the abstract plant is required to have records of all events affecting county property ownership. The abstract plant is also inspected for proper indexing of documents. If the plant satisfies these requirements, it is issued a certificate of

authority to operate in a particular county. If the plant subsequently operates in another county, records of the additional county would have to be compiled and then inspected by the board.

We did not evaluate the technical inspection process nor did we analyze specific board "take-off" sheets. However, we reviewed the timing and frequency of inspections of the 65 currently licensed abstract plants in Montana. The results of our analysis appear in illustration 3-5.

INSPECTION OF ABSTRACT PLANTS

Calendar Year Abstract Plant <u>Last Inspected</u>	Number of <u>Plants Inspected</u>	Percent of <u>All Plants</u>
1973-1977	12	18.5
1968-1972	11	16.9
1963-1967	10	15.4
1958-1962	8	12.3
1953-1957	5	7.7
1948-1952	2	3.1
1943-1947	1	1.5
Pre-1943	0	0.0
Never Been Inspected	<u>16</u>	<u>24.6</u>
TOTALS	65	100.0

Source: Compiled by the Office of the Legislative Auditor.

Illustration 3-5

As noted earlier, one objective of the Board of Abstracters is the monitoring of abstract plants to assure proper maintenance. This is due in part to the fact that abstract plants must be continually updated due to daily changes in property ownership and claims against property. No routine applicable inspections are required and as cited in illustration 3-5, 25 percent of all plants have never been inspected. Illustration 3-5 also demonstrates that only 18.5 percent of all abstract plants have been

inspected in the last five years. In the last ten years only 35 percent of the firms have been inspected leaving the remaining 65 percent uninspected. By inspecting such a small percentage of plants each year, the board has no way of knowing if plants are being properly maintained.

The board has the authority, at its discretion, to spot-check abstract plants. This option has never been exercised. One board member stated an on-going inspection program has "never gotten off the ground." He noted that this was due to business constraints of board members. The board regulation mandating plants be inspected when sold also requires considerable board members' time; therefore, time is not available for additional inspections.

The board may also revoke an abstract plant's certificate of authority. Our review of board minutes from 1972 to 1977, and our discussions with board members, disclosed that a certificate of authority has never been revoked nor has such a situation ever been presented to the board.

Section 66-2111(2), R.C.M. 1947, states that to receive a certificate of authority an abstract plant must be in the charge of a registered abstracter. Our review disclosed five licensed abstract plants with no licensed abstracter working at the facility. The board chairman confirmed that while no licensed abstracters work directly at the facilities, full-time licensed abstracters in other counties are available to supervise four of the five licensed plants in question.

We also found one firm which advertises in the telephone yellow pages under "abstracters" but is not licensed nor has it been inspected by the board. We discussed this problem with the board. Board members indicated that the firm either subcontracts the abstracting work to a local licensed abstracter or purchases the necessary information from the local licensed abstracter. The board chairman also provided the Legislative Auditor with the abstract certificate the firm uses which the local abstracter signs along with the firm in question. The certificate specifically states, in several places, that the local abstracter assumes no liability and responsibility and the "abstract of title was compiled by" the firm in question and in fact, the certificate expressly shows the firm as "abstracters." Section 66-2101, R.C.M. 1947, states that any firm desiring to engage in the business of compiling abstracts must obtain a license from the Board of Abstracters. The board was aware that the firm is operating without a license, but the board has no plans to inspect and/or license the facility. Board members expressed the view that the firm was not doing "abstract business" and as a result is not subject to the licensing requirement. However, it appears that the firm is holding itself out to the public as an "abstracter" and considers itself to be doing abstract work. Such actions are required to be licensed under the current abstract law.

Although the monitoring process is ineffective and one plant operates without a license we found no evidence that the public was being harmed due to inadequate abstract plants. We reviewed board minutes for fiscal years 1971-72 through 1976-77 and found

no board action taken against an abstract plant. Only one complaint against a plant was found and it was resolved with a telephone call. Discussions with board members and other licensed abstracters disclosed no instances of public harm resulting from improper or incorrect abstracting work. And, finally, our research of the legal indices disclosed no legal actions as a result of inadequate or improper abstracting work.

In summary, Montana abstract plants currently operate under little or no board regulation yet this has resulted in no discernible harm to public health, safety, or welfare. In this connection, board members told us that due to the nature of the industry with which the abstracters' profession deals--real estate--it may take from five to 15 years for problems caused by inadequate abstracting to materialize. However, even over such a historical time frame, problems and public harm have not surfaced.

ABSTRACTERS' LICENSING

The Board of Abstracters' reported objective regarding professional abstracters is to license individual abstracters. Individuals applying for a license (referred to as a Certificate of Registration), must successfully pass an examination. The exam is given in October and May and takes one and one-half days to complete. Applicants are required to define technical terms and perform abstracts of documents. Interpretation of document relevance and significance is also required. The board prepared one standard examination that is used for applicants taking the exam for the first time. A second examination is used for retesting at a later date if required.

A national expert in occupational licensing--Benjamin Shimberg--has stated that the quality of testing in many occupational licensing programs is very low.¹ Shimberg points to numerous problems including inadequate question design, lack of test planning, and lack of adequate evaluation criteria. Based on this information, we reviewed the board's current testing procedures. We found that the board uses the same standard examination repeatedly. The exam was last updated in 1974. The board secretary stated that prior to 1974, the exam was updated in the late 1960s. Updating, when accomplished, is done by one member of the board. The Department of Professional and Occupational Licensing has no record of any evaluation criteria for the questions. No scientific evaluation of specific test questions for degree of difficulty and adequacy has been developed. Consequently, the board does not know if the standard abstracters' examination adequately tests applicant's knowledge of the abstracting profession.

The board tests applicants for abstracter licensing in order to evaluate knowledge. Once licensed, an abstracter is presumed to be competent and knowledgeable simply because he is licensed by the board. A review of board minutes and files disclosed that no abstracter has ever been investigated. While the board has the statutory authority to revoke a certificate of authority, it has never been done. Finally, the board has made no evaluation

¹ Benjamin Shimberg and Barbara A. Esser and Daniel H. Kruger, "Occupational Licensing: Practices and Policies," Public Affairs Press, Washington, D.C., copyrighted in 1972 and 1973 by Educational Testing Service and Michigan State University.

of licensed abstracters to determine if continuing education or retesting is needed to maintain the licensed abstracter's knowledge and competency. Most of Montana's regulated professions face these problems. It could be argued that if there is a need for public protection through licensing and regulation, then there is a corresponding need to assure the public of continued maintenance of a licensee's knowledge and competence. Regulation in the interest of the public protection should not merely be reactionary. Given a need for the protection of the public, the respective regulatory agencies/boards should at least evaluate the need for mandatory continuing education or some other system of assuring that business maintain the knowledge and competency necessary to properly protect the public.

We attempted to verify that all licensed abstracters had actually passed the examination. Until recently, examination records of successful applicants were inadequate. Because of the absence of adequate records we could not determine if there are licensed abstracters who had not passed the exam. Consequently, there is no obvious assurance that every licensed abstracter has met the minimum capabilities and training required to pass the exam.

Individuals employed in licensed abstract plants do not have to be licensed but if their abstract work is to be certified, it has to be reviewed by a licensed abstracter. Information gathered by the Department of Professional and Occupational Licensing at the request of the Legislative Auditor indicates that at least 63 nonlicensed abstracters are performing abstract work. The board

does not periodically spot-check to determine if licensed abstracters are reviewing all work completed by nonlicensed abstracters.

Because of this absence of review, the board cannot assure the public that all abstracts are prepared, or at least reviewed, by a licensed abstracter.

We reviewed board minutes and complaint files for fiscal years 1971-72 through 1976-77 to determine if the public had ever questioned the work or competency of a licensed abstracter. We found no evidence indicating that the public has complained or been harmed because of unlicensed or incompetent abstracters. In other words, the absence of extensive abstracters' regulation has caused no discernible harm to the public health, safety, or welfare.

SUMMARY

Is there a reasonable relationship between the exercise of the state's police powers and the protection of the public's health, safety, or welfare? In this chapter we discussed the limited public use of abstracts. Many lending institutions and governmental agencies will not accept abstracts. The majority of Montana mortgages are secured by title insurance, not abstracts. A survey of 14 western states disclosed only five regulating the abstracting profession. Officials in all 14 states indicated trends away from abstracts and towards the use of title insurance. Because of the trend to title insurance and away from abstracts, there is not a reasonable relationship between the current exercise of the state's police power and the protection of the public.

Would the absence of regulation harm the public? Twenty-five percent of all plants have never been inspected. In the last ten years only 35 percent of all plants have been inspected. Abstract plants are not periodically spot-checked. Although there has been an absence of active plant regulation, no evidence of public harm could be found.

The abstracter licensing and control process contains deficiencies. The work of abstracters yet to be licensed is not reviewed or regulated by the board. The competency of licensed abstracters is not reevaluated. Although abstracters are presently subject to very limited regulation, no discernible public harm has resulted.

The public presently relies upon the opinion of an attorney which is based upon the abstracter's work. Under existing law, the public is not protected from title claims arising when the claims could not be disclosed through a review of the public records and the validity of the abstract process is largely dependent upon the competency of the attorney.

Finally, a question as to whether or not regulation is necessary is different than a question as to whether or not the abstracters' profession itself is needed. There appears to be a need for abstracters, although the absence of abstracters' regulation would not harm the public.

Chapter IV

THE REGULATION PROCESS

This chapter addresses a third question posed by the sunset law: Are all facets of the regulatory process designed solely for the purpose of, and have as their primary effect, the protection of the public?

REGULATORY PROCESS DESIGN

Benjamin Shimberg--in his book on occupational licensing¹--in discussing the origins of licensing expresses the view that professions initially created voluntary associations to promote their professional interests. Following voluntary organization came the enactment of statutory licensing. Events surrounding the creation of the Board of Abstracters generally parallel Shimberg's discussion about origins of licensing. The Montana Land Title Association was organized in 1909 to promote the interests of the abstracting business in Montana. The Montana Land Title Association drafted legislation creating a Board of Abstracters and by request had it introduced in the 1931 Legislative Session. The bill--Senate Bill 31--was passed as Chapter 105 of the 1931 Session Laws. The law creating the Board of Abstracters and providing for the licensing of abstracters and abstract plants remains essentially the same today as it was passed in 1931.

A retired abstracter who was formerly an officer of the Montana Land Title Association as well as a member of the Board

¹ See footnote on page 36.

of Abstracters advised us that the public was not experiencing problems with abstracts at the time of board creation. He indicated that the board was created because Montana abstracters wanted "some laws with teeth; they wanted to make the plants comply to proper operating standards."

PUBLIC PARTICIPATION

One indicator of regulation designed for public benefit would be the extent of public participation in board decisions. Scrutiny of board minutes from May 1971 to the present disclosed that no member of the general public has attended board meetings. Board meetings have been held only in Helena. We asked one board member if the general public was encouraged to participate at board meetings. He stated that the public does not understand abstracting and would not provide valuable input.

Montana law enacted in 1975 (Section 82-4226, R.C.M. 1947), requires that "Legislative guidelines should be established to secure to the people of Montana their constitutional right to be afforded reasonable opportunity to participate in the operation of governmental agencies prior to the final decision of the agency." A related section of Montana law (Section 82-4228, R.C.M. 1947), requires each agency to develop procedures for allowing and encouraging public participation. In response to these requirements of law, the director of the Department of Professional and Occupational Licensing developed Public Participation Rules. The director presented these rules in writing to the board in May 1976. The rules were discussed but not adopted

by the board. Approval or denial of the rules of public participation were placed on the October 1976 meeting agenda but no action was taken. The board did not meet in May 1977, and did not discuss rules of public participation during the October 1977 meeting, even though the need for them was again called to its attention. Therefore, no rules of public participation have been formulated and adopted as required by the 1975 law.¹

As a means of furthering public participation some states require public members to serve on regulatory boards. For example, California and New Jersey have added public members to the various licensing boards. The Montana abstracter's law (Section 82A-1602.1, R.C.M. 1947), requires each board member to be a registered abstracter during his appointed term. Since the board has taken no positive action to solicit public response, and since the public has not participated in board regulatory processes, there is no assurance that the board's operations are completely responsive to public need.

PUBLIC DUTY VERSUS PROFESSIONAL INTEREST

During fiscal year 1976-77 there were 155 licensed abstractors in Montana. As a result, leaders in the abstract profession appointed to the board are often the same leaders of the Montana Title Association. For example, the current secretary of the board is also the president of the Montana Land Title Association. In these dual capacities this individual must represent and strive for the best interests of the profession yet, at the same

¹ The Legislative Auditor learned in January 1978 that the board is considering adopting rules of public participation.

time, must direct the board towards public protection--a situation which may be inherently conflicting but probably common to most licensing boards in Montana. Our review of board minutes for fiscal year 1971-72 through fiscal year 1976-77 disclosed no situation where the board resolved a difference between the profession and the public. If such a situation were to arise, the current secretary would be forced to act to the disadvantage of either the public or the profession, both of which he is forced to represent. This situation is unfair to the person involved.

The board chairman has been placed in a similar conflicting situation. This board member is president of a company which owns 21 percent of all licensed Montana abstract plants (14 of 65 licensed plants). In addition, 25 of the remaining 51 licensed plants sell title insurance underwritten by this company. Directly or indirectly, this individual has a financial concern in over 50 percent of the licensed abstract plants in the state. This situation places the board chairman in a conflicting situation generally, and in particular, if he were to inspect one of the firms in which his company has a financial concern or in the inspection of a competitor's firm. During 1975 the board chairman was involved with the reinspection of an abstract plant owned by his company. Although the board chairman had disqualified himself during the earlier initial inspection, he did not disqualify himself for the reinspection which should be just as important as the initial inspection. Requiring a board member to act in a situation such as this is also unfair to the person involved and

represents an inherent conflict of interest between public duty and professional interests.

The question of board members' conflict of interest was brought to the attention of the Office of Citizens' Advocate in April 1974. The Citizens' Advocate suggested that the board adopt written policies regarding the matter. To date, the board has not addressed this question.

RESTRICTIVE ENTRY

Restrictive entry pertains to the concept that laws, rules, and regulations could prohibit qualified persons from entering the profession even though they have the qualifications necessary to perform the task expected of them. Ordinarily, examinations test a person's qualifications, but usually state licensing boards also require experience.

The Administrative Rules of Montana (Section 40-3.6(6)S650), establish residency and experience requirements for abstracters applying to take the examination. The applicant is required to have three years' experience in a Montana abstract plant. Four years' abstracting experience outside of Montana with one year of experience in a Montana abstract plant may be substituted for the three year Montana experience requirement.

The experience requirements appear unnecessarily restrictive. For example, a qualified abstracter who moves to Montana cannot be licensed until he has worked at least one year in a Montana abstract plant irrespective of how many years of experience he has and how qualified he is. In addition, it is questionable

whether experience requirements measure an applicants qualifications. Some more knowledgeable individuals might successfully qualify to be licensed professionals after only one year--others might not understand abstracting after three years, as evidenced by the less than 100 percent examination pass rate. If the examination is an accurate test of an abstracter's qualification--and it should be--no residency requirements and in the case of abstracters, no experience requirements should be necessary. This is particularly so since the record systems and record research techniques in most other states are similar if not identical to Montana's.

SUMMARY

Are all facets of the regulatory process designed solely for the purpose of, and have as their primary effect, the protection of the public? The present regulatory process was originally sought by the profession, not the public. The public does not attend board meetings and the board has not adopted rules for the encouragement of public participation as required by law. Certain inherent board conflicts between public duty and professional interests are evident, but the board has adopted no policy governing the problem and requirements of the Administrative Rules of Montana excessively restrict entry into the profession. In other words, certain facets of the regulatory process are not designed solely for the purpose, and have as their primary effect, the protection of the public.

Chapter V

COST CONSIDERATIONS

This chapter addresses the fourth and fifth questions posed in the sunset law: Does the regulation have the effect of directly or indirectly increasing the cost of goods or services? Is the increase in costs more harmful to the public than the harm which could result from the absence of regulation?

THE ECONOMIC MARKETPLACE

Abstract plants are licensed to operate in specific counties in Montana. Although some plants operate in multiple counties, individual records for each county must be maintained in the plant. Currently, all 56 Montana counties have at least one licensed abstract plant. Ten counties have at least two licensed plants and at most four licensed abstract plants operate within a county boundary. At first glance, it might appear that a monopolistic situation exists.

A monopoly occurs when only one seller provides a good or service in a given marketplace. We earlier noted that title insurance is fast becoming a substitute for abstracts. Consumer demand can be satisfied using abstracts or title insurance. As of July 1977, 17 title insurance underwriters were licensed to operate in Montana. The underwriters are represented by 110 licensed agents, many of whom are licensed abstracters. Title insurance agents may operate in any county of Montana. Economically, consumer demand for title assurance can be satisfied by abstracts or by title insurance. The consumer is afforded a

choice, however limited, of service provided by competing firms offering different types of title assurance.

Economists term this market condition an oligopoly. The oligopolistic market has more than one seller but not so many sellers that the action of any one seller would be negligible. In other words, competing firms exist but one firm's actions directly affect competition. Economists generally agree that consumer costs are higher in an oligopolistic market than in a purely competitive market.

The reason for the oligopoly in Montana's title assurance marketplace is important. If state regulation causes the oligopoly, it is reasonable to assume that higher consumer costs due to the oligopolistic market are a direct result of state regulation. In this regard, 57 percent of the abstracters responding to our survey of licensed abstracters in Montana expressed the belief that the present regulation of abstracters does not increase the cost to the consumer.

The limited demand for services and the high cost of entry into the abstract business are the cause of the oligopoly in the title assurance market--not state regulation. The demand for abstracts and title insurance is directly related to population and the population's purchase of real estate. The majority of Montana's counties are sparsely populated. Real estate purchases and the demand for title assurance services could not support many competing firms in each county. A substantial capital investment is required to build an abstract plant. A businessman,

wishing to derive normal economic profits through his entrepreneurial expertise, will not make a large investment if the demand for his services will not provide reasonable profits.

REGULATION COSTS

Costs of regulation include the monetary amount paid for goods or services. Regulation costs also include nonmonetary items such as the delivery and timeliness of goods or services--even the availability or absence of goods or services. The U.S. General Accounting Office (GAO) in a June 1977 publication, identified six classifications of costs associated with governmental regulation.¹ We reviewed the GAO cost classifications, adapted the categories as being the most reflective of identifiable governmental regulation costs, and organized these costs into five categories. Following is a discussion of each regulatory cost as it applies to the Board of Abstracters.

ADMINISTRATIVE COSTS. Administrative costs are directly observable and related to governmental regulation. These costs include costs imposed upon the regulated profession as well as governmental expenditures necessary to administer the necessary regulatory activities. Governmental administrative costs include license fees paid to the regulatory agency and used to run the regulatory activity. An observable governmental regulatory cost would be the regulatory agency's expenditures. The regulated industry or profession also bears administrative costs in the

¹ Report to Congress by the Comptroller General of the United States, "Government Regulatory Activity: Justifications, Processes, Impacts, and Alternatives," June 1977, PAD-77-34.

form of staff hours spent completing applications and report forms.

The administrative costs to the governmental sector regulating the abstract profession are noted in illustration 5-1. These expenditures are funded from abstracters' and abstract plants' annual license fees. Each licensed plant must pay \$25 annually to renew its license. Each licensed abstracter must pay \$5 annually to renew his license.

Administrative costs also include those costs the abstract plants must pay in order to fill out board forms, complete reports, etcetera. The Board of Abstracters has no reporting requirements other than the completion of plant license renewal forms once a year. The cost of doing this is insignificant on the part of the private sector.

The administrative costs of abstracting regulation are minimal. While we can assume these costs are absorbed into abstract plant's overhead and subsequently pass to the consumer, administrative costs do not present a significant burden to the Montana consumer.

EXPENDITURES - BOARD OF ABSTRACTERS

<u>Fiscal Year</u>	<u>Expenditures*</u>
1976-77	\$1,397
1975-76	2,393
1974-75	1,210
1973-74	653
1972-73	942
1971-72	1,274

*Expenditures do not include abstract plant inspection fees.

Source: Compiled by the Office of the Legislative Auditor.

COMPLIANCE COSTS. Compliance costs are imposed upon a regulated profession when specific actions and expenses must be incurred in order to comply with statutory requirements. Automobile emission standards imposed by the government represent compliance costs to auto makers. Compliance costs can also be identified in the governmental sector as those costs necessary to assure compliance with regulation. The inspection of a production facility by an Occupational Safety and Health Administration (OSHA) safety inspector requires governmental expenditures--a governmental compliance cost. The production facility's purchase of safety rails to meet OSHA standards requires private sector expenditure--also a compliance cost.

The board does not routinely spot-check or directly monitor abstracters or plants. Therefore, the compliance costs to the governmental sector are nonexistent.

The board inspects new plants and plants that are to be sold. The costs of these inspections are paid by the plant in question--not the board. These costs represent compliance costs to the private sector. Illustration 5-2 summarizes private sector compliance costs due to the inspection of abstract plants.

BOARD OF ABSTRACTERS EXPENSES TO INSPECT ABSTRACT PLANTS

<u>Fiscal Year</u>	<u>Inspection Expense Paid by Plants</u>
1976-77	\$1,481
1975-76	1,219
1974-75	245
1973-74	438
1972-73	402
1971-72	703

Source: Compiled by the Office of the Legislative Auditor.

Illustration 5-2

The board requires abstract plants to maintain adequate records and an index to those records. The legal authority of the board allows inspection of plant records at any time. The cost of record maintenance might be interpreted to be a compliance cost. Yet, abstract plants must have these records if abstracts are to be completed. Plants would comply with the recordkeeping requirement even if the law did not mandate such a requirement. One indicator of this might be the fact that 25 percent of the plants have never been inspected. Yet no problems with these plants have surfaced.

The Board of Abstracters imposes no other regulation that requires specific compliance with the law resulting in added expense to the abstract plant. For these reasons, we could only identify those compliance costs resulting from abstract plant inspection. These compliance costs are minimal and do not represent a significant cost to the industry or the Montana consumer.

INEFFICIENCY COSTS. Regulation of a profession can sometimes cause the inefficient utilization of resources. Inefficient utilization of resources can be observed in industries where prices and rates of return are directly or indirectly regulated. Efficient use of resources would increase profits by cutting costs, resulting in a lowering of the regulated price in order to maintain the same rate of return.

Governmental regulation can also cause inefficient methods and procedures. Regulation, if it requires outdated methods or procedures, imposes unnecessary costs upon the regulated industry, thereby increasing prices of goods or services to the consumer.

The Interstate Commerce Commission (ICC) regulates trucking firms and specifies routes, areas to be served, and allowable cargo. If a truck is prohibited from carrying certain cargo on the return trip, the firm may be forced to inefficiently utilize its resources.

Inefficiency costs resulting from governmental regulation are not as easily identifiable as are administrative or compliance costs. We can dismiss outright any abstracter's inefficiencies due to price or rate of return regulation since the board does not regulate this aspect of the abstracting profession. The board also does not prescribe any identifiable regulation causing abstract plant's use of inefficient methods or procedures. In fact, the board does not specifically require or imply any methods or procedures for abstract compilation or abstract plant's operation.

Board regulations require abstracters to comply with experience and residency requirements. We earlier discussed these requirements as being overly restrictive of entry into the profession. Restrictive entry into a profession limits supply of a service which could subsequently drive prices up. Although entry into the profession is restricted, the consumer is afforded a choice between using abstracts and title insurance. We earlier noted that title insurance is now being used in the majority of real estate transactions. Therefore, restrictive entry into the abstracting profession has not reduced the supply of title assurance services and restrictive entry does not represent an extensive or readily identifiable inefficiency cost.

NON-CREATIVITY COSTS. Regulated professions and industries might tend to be satisfied with current business conditions. Technological change, research and development, and entrepreneurial creativity could be discouraged. The primary motivation for technological change is the incentive to earn profits, i.e., to do things better or more efficiently. If prices and profits are directly or indirectly regulated, an industry or profession becomes insulated and loses the profit motivation. Technological change resulting in public benefit through improved methods and lower costs is retarded.

Drug companies faced with stringent governmental regulation experience noncreativity costs. The extensive drug testing and research process requires significant expense by the drug company. Governmental approval of the drug can also take considerable time and expense. If the approval process is too costly, the drug company may tend to reduce innovation and creativity--be satisfied with the production of drugs already tested and approved.

The approval and regulation of abstract plants has not caused a slowdown of technological change in the title assurance industry in Montana. We demonstrated in Chapter III the significant trend towards title insurance and away from abstracts. The title assurance profession has evolved creatively and now offers consumers generally less costly and more timely title assurance services in the form of title insurance. Costs due to discouraged creativity and reduced research and development have not evolved due to regulation of the abstracting profession.

TRANSFER COSTS. Transfer costs are those costs passed from one group to another--usually from the business or profession to the consumer. The classic example of a transfer cost is welfare taxes and payments. The more affluent are taxed and the tax moneys are redistributed to welfare recipients. The total amount of dollars in the system remains static--the dollars are simply transferred from one group to another.

Regulation of a profession can also cause higher prices which are subsequently transferred to the consumer. The mere fact that a profession is licensed can raise status in the community. Professions with high status can more readily justify and demand higher prices for their products.

The fact that abstracts are regulated has not caused an increase in abstract prices. We compared abstract price ranges in Montana to states with no regulation. No significant difference could be disclosed.

Other aspects of the regulatory process do not cause higher costs transferred to the consumer. We also point to the limited demand for abstracts. Since abstracts are not used exclusively in place of title insurance, higher than normal prices cannot be charged and transferred to the consumer.

PROBABLE COSTS OF DEREGULATION

In Chapter III we demonstrated that the public primarily relies upon title insurance to protect property title. Abstracts are no longer accepted by many lending institutions. If the abstract profession were deregulated, there is no reason to believe the use, cost or availability of abstracts would change.

The trend towards title insurance would continue while abstracts would still be available if needed.

Probable costs resulting from deregulation will not be significant since the title assurance marketplace is not expected to change. The public is not required to use an abstract, and in fact is not doing so now. If abstract costs become high the consumer will use title insurance to protect property title. If title insurance costs increase more competing firms will enter the marketplace, forcing prices to decline and settle at a reasonable profit-providing level. In addition, title insurance prices in Montana are regulated by the Insurance Commissioner. The present costs of current regulation and projected costs of deregulation are compared in illustration 5-3.

BOARD OF ABSTRACTERS - OCCURRENCE OF COSTS
OF REGULATION AND PROJECTED COSTS OF DEREGULATION

<u>Cost Category</u>	<u>Cost Occurrence With Current Regulation</u>	<u>Probable Cost Occurrence With Deregulation</u>
Administrative Costs	Board Expenditures	None
Compliance Costs	Plant Inspection Fees	None
Inefficiency Costs	None	None
Noncreativity Costs	None	None
Transfer Costs	None	None

Source: Compiled by the Office of the Legislative Auditor.

Illustration 5-3

SUMMARY

Does regulation have the effect of directly or indirectly increasing the cost of goods or services and is this increase in cost more harmful to the public than the harm which could result from the absence of regulation? The answers to these cost questions

appear logical in light of the evidence presented in Chapters III and IV. Thirty-seven percent of the abstracters responding to our survey felt that regulation increases costs to the consumer. We identified only board expenditures and plant inspection fees as being costs of regulation. These costs are minimal, and in illustration 5-3 we also projected that the occurrence costs of deregulation would be nonexistent. Under present regulation, abstract costs are determined by economic market conditions. Current abstract costs represent consumer costs in a deregulated market--there will be no change in consumer costs if the state is no longer involved in the regulation of the abstract profession. In other words, although the present regulatory cost appears to be minimal, the probable costs under deregulation would be nonexistent.

Chapter VI

CONCERNS EXPRESSED by the PROFESSION

In our attempt to review all aspects of the abstract business, we visited abstract plants and interviewed professional abstracters. We also spoke before the 1977 annual meeting of the Montana Land Title Association and distributed a questionnaire among those in attendance. This chapter is an evaluation of the specific concerns expressed by the abstracters' profession about the need for state regulation of abstracters.

INADEQUATE ABSTRACTS WILL BE PREPARED

Some abstracters responding to our questionnaire mentioned that if abstracting were not regulated, inadequate abstracts would be prepared by unqualified abstracters (curbstoners), resulting in financial harm to the general public. Members of the board believed that this has not happened under present regulation due to the very presence of the board--the police effect.

This concern is first addressed by the fact that the general public does not now use abstracts to any appreciable degree. When the general public uses abstracts, they rely upon lending institutions and attorneys to provide an evaluation of the abstract. The lending institution and the attorney provide the necessary regulation of the abstracter. If the abstracter provides inadequate services, the lending institution and the attorney will no longer rely on the abstracter. The lender has a mortgage interest in the property and will require quality work from the abstracter. The attorney and the abstracter can be held liable

by a client if there was an undisclosed property claim in the public documents. The attorney, therefore, will expect and demand that the abstracter research all public documents completely.

The abstracter is in business to make a profit. It is unreasonable to assume that the abstracter will maintain inadequate documents in order to cut operating costs. The abstracter would only be sacrificing his market share as well as business solvency. If the abstract is inadequate, the attorneys and lending institutions will no longer use the abstracter's services. The abstracter can also be held liable for the misrepresented product. It is highly unlikely that inadequate abstracts will be prepared. We demonstrated in Chapter III that the profession operates under little direct monitoring by the board yet we found no evidence demonstrating that inadequate abstracts are being prepared.

Even if inadequate abstracts were prepared, the consumer is no better off with regulation than without regulation. The current regulatory process provides no remedy in the case of inadequate abstract of title. The consumer must sue at his own expense to recover any damages.

POOR PLANT MAINTENANCE

Some abstracters also noted that in the absence of regulation, abstract plants would not be properly maintained. In Chapter III we note that abstract plants are not monitored by the board once they become licensed. One-quarter of the plants have never been inspected. Plants are not spot-checked and only 35 percent of all plants have been inspected in the last ten years.

Even though licensed abstract plants are not monitored, no problem of inadequate plant maintenance has evolved. During the course of our audit we found no evidence to point to inadequate plant maintenance. No public complaint regarding inadequate abstract services has been filed at least in the last six years.

We must also point to our prior discussion of profitability. If the plant is to remain solvent, it must maintain adequate records to provide complete and accurate abstracts. Otherwise, business will gradually discontinue as users switch to more reliable sources.

If abstract plants were poorly maintained the result would be the incomplete or inadequate preparation of abstracts. We must point to our discussion in the first section of this chapter. That is, the plants will be maintained because they must be in order that adequate abstracts can be prepared and sold to the public.

PRICES WILL INCREASE

Some abstracters believe that abstract prices would increase if the profession were deregulated. In Chapter V, we demonstrated that the economic marketplace, not state regulation, dictates prices. We also note that if prices of abstracts were to rise title insurance would be substituted for abstracts and the trend towards complete dependence on title insurance would accelerate.

One abstracter noted that if the abstract profession was deregulated, the dependence upon title insurance would ultimately force an increase in title insurance prices. We discussed this concern in Chapter V when projecting the probable costs of

deregulation. The Insurance Commissioner regulates the prices of title insurance. In addition, economic theory indicates that if prices of title insurance increases more competing firms will enter into the market place thereby causing price competition. We also compared title insurance rates in states with no title industry regulation to Montana's rates. In some cases, the premium rates were slightly lower and in other cases slightly higher but in all cases the differences were not significant. While the board has no statutory authority regarding the regulation of title insurance, legislation giving them such authority was proposed to the 1977 Legislature, but failed to pass. Consequently, title insurance is subject only to the controls exercised by the Insurance Commissioner.

Chapter VII

LESS RESTRICTIVE REGULATION ALTERNATIVES

A sixth and final question posed by the sunset law specifically requires the evaluation of alternative forms of regulation. Specifically, it asks: Is there another less restrictive method of regulation available which could adequately protect the public?

THE RELATIONSHIP BETWEEN STATE INVOLVEMENT AND PUBLIC PROTECTION

Section I of the sunset law notes legislative concern over the fact that state agencies and programs should exist to be responsive to state citizen's needs. The board's stated goal is to protect the public from incorrect abstract of title through licensing and regulation of the abstracting profession. Therefore, the overall sunset question becomes one of measuring potential consumer harm because of incorrect abstract of title and matching this harm to the degree of state involvement needed.

It is reasonable to assume that if consumer harm occurs often and the degree of consumer harm is severe, the state should protect the consumer. As an example, the state requires all drivers to be licensed and periodically relicensed. Licensing measures the driver's knowledge as well as his driving skills. In addition, the state enforces laws intended to further protect the public from death or injury due to a driver's negligence or incompetence. In other words, the state of Montana considers the public to be subject to extreme endangerment, death, or injury; hence, the need for licensing and continued regulation of Montana drivers.

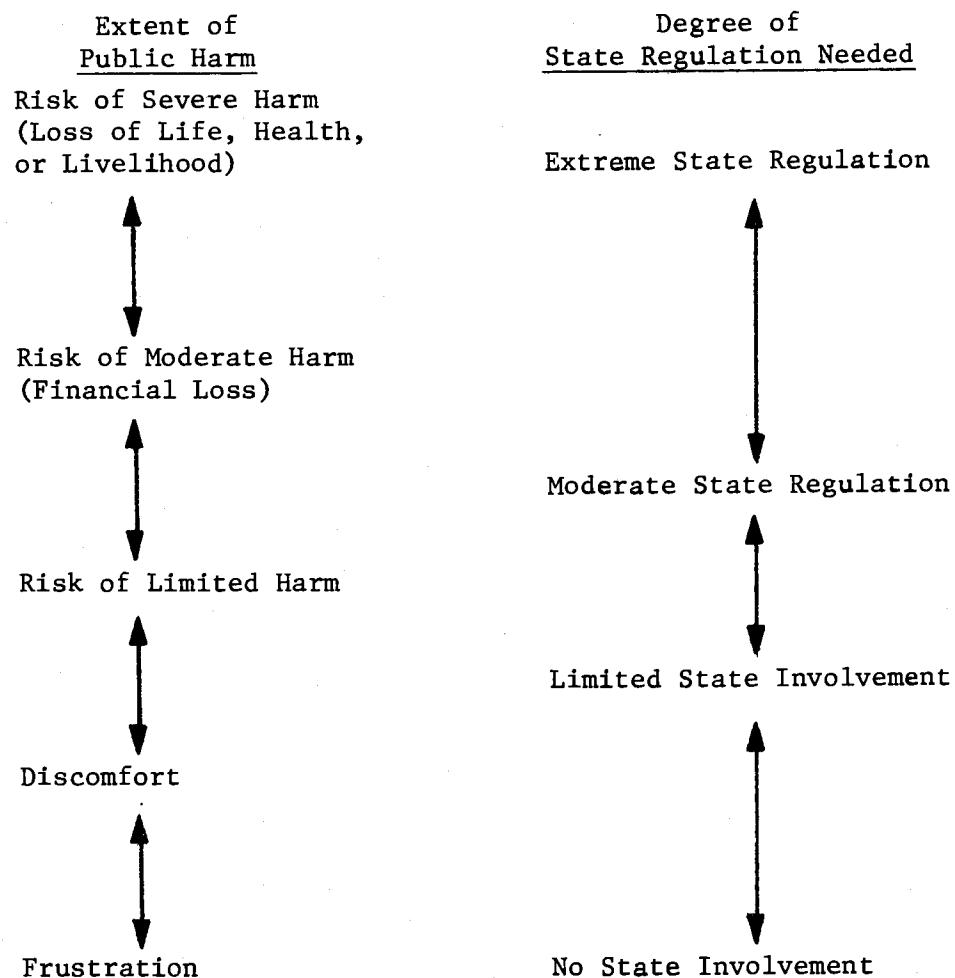
The sunset law (Section 82-4601(2)(c), R.C.M. 1947), stipulates that:

"No profession, occupation, business, industry, or other endeavor are subject to the state's regulatory power unless the exercise of such power is necessary to protect the public health, safety or welfare from significant and discernible harm or damage. The exercise of the state's police power shall be done only to the extent necessary for that purpose."

The public health, safety, or welfare can be construed, in many instances to mean the physical safety of the general public while in other instances it may refer to economic welfare. In the first instance--physical safety--the primary reasons for government regulation are often life or death issues--a question of irreversible harm. In the second instance--economic welfare--the issues are transactions rather than life and death issues. In many, if not all of these instances, the harmful effects of an erroneous transaction may be reversed by means of professional liability insurance and/or a lawsuit. The regulation of the abstracters' profession falls into this category, i.e., it is not based upon life or death issues.

Illustration 7-1 displays the relationship between probable consumer harm and the need for public protection through state regulation. The more severe potential type of consumer harm requires greater state involvement in the regulation of a profession.

THE RELATIONSHIP BETWEEN PUBLIC PROTECTION
AND STATE REGULATION OF A PROFESSION



Source: Adapted from Michigan Report to the Governor on Occupational and Professional Licensure, January, 1976.

Illustration 7-1

ALTERNATIVE REGULATION APPROACHES

There are a number of alternative forms of regulation ranging from the most extreme or restrictive--the present system of licensing--to the least restrictive--no licensing or regulation whatsoever. In 1976 the Wisconsin Legislative Council studied alternative approaches to professional and occupational regulation

and identified nine variations of state regulation.¹ We reviewed the alternative approaches and adapted them as a framework for evaluation of the alternatives. These alternatives and their relevance to the regulation of the abstracters' profession are discussed in the following paragraphs.

ALTERNATIVE 1: REGULATION AND LICENSING BY PROFESSIONAL
ABSTRACTERS' BOARD

This alternative is the method presently used to regulate abstracters in Montana, i.e., licensing and regulation by the board. It is currently the most extreme or restrictive form of professional licensing and regulation and requires the most extensive degree of state involvement in the regulatory process.

As currently implemented, the board is composed entirely of members from the profession. As previously discussed in Chapter II, the board inspects and licenses abstract plants and examines and licenses individual abstracters. Unlicensed individuals and firms are prohibited from practicing abstracting.

ALTERNATIVE 2: LICENSING AND REGULATION BY AN INDEPENDENT
BOARD

This alternative is the same as alternative one except that an independent board would consist of nonprofessional members. It would still be a state board/agency but the members would be drawn from outside of the regulated industry or profession. An independent board might be more responsive to public need but would still license abstracters and abstract plants--the same as

¹ Wisconsin Legislative Council, "State Regulation of Occupations: Alternative Approaches," Information Memorandum 76-15, August 1976.

is now done. Although an independent board might be more responsive to public need, a board made up of public members may have to periodically seek technical expertise needed to regulate the abstracting profession. The cost of this alternative would be approximately the same as the cost of alternative one and many of the other pros and cons pertaining to regulation by a state board under alternative one would also pertain here.

ALTERNATIVE 3: LICENSING AND REGULATION BY STATE AGENCY

Alternative three is similar to alternative one, except that it represents regulation through licensing of individuals or firms by a state agency--not a board. There would be little or no change insofar as the licensing process is concerned.

Alternative three would require licensing through examination and regulation similar to the present method of regulation (as discussed in the first alternative), except that the regulation would be accomplished through an operating department of state government such as the Department of Business Regulation or the Department of Professional and Occupational Licensing rather than a special board. Licenses would be renewed annually and licensed abstracters would be subject to regulation by the department. The cost of this alternative would probably be the same as the cost of current regulation by the board.

ALTERNATIVE 4: LIMITED-TERM LICENSE GRANTED BY STATE AGENCY

Alternative four, essentially the same as alternative three, would license abstracters and abstract plants for a limited term. Renewal would depend upon the applicant and the plant meeting certain qualification standards. Abstracters would be required

to maintain proficiency through continuing education and could even be required to pass an examination periodically. Abstract plants would be relicensed after an inspection similar to the inspection now accomplished to license new abstract plants.

Licensing would be done by a state agency and the cost of this alternative would probably be the same as current expenditures by the board. Although the current board would not exist, the legislature would have to appropriate a similar amount of funds to the state agency charged with regulatory responsibility.

ALTERNATIVE 5: LICENSING OF LOCATION

This alternative consists of licensing premises rather than persons. In the case of abstracters, location licensing would be based upon the qualification of the abstract plant. Abstract plants would be inspected, as is now the case, to determine if proper records are maintained and indexed. The licensing process could be accomplished by a state agency rather than a special board as is now the case. This would assure adequate plant records and records maintenance, but would also increase cost to the consumer because of the need to increase expenditures for plant inspections. Once licensed, the abstract plant would be subject to no further regulation although the agency would be able to revoke the plant's license if plant records were not maintained.

ALTERNATIVE 6: CERTIFICATION

Certification involves a determination that a person meets certain prerequisites at a given point in time and as a result, is "certified." The prerequisites for certification of abstracters

could be passage of a national exam, a college degree, experience in an abstract plant, or other types of indicators that demonstrate an applicant is qualified to compile abstracts. It differs from licensing in that there is no intent to further regulate or periodically relicense or recertify the license. It is a one-time process which allows the public to distinguish between a certified person and a noncertified person. Certification could be accomplished by a state agency or by a private trade or professional association such as the Montana Land Title Association. If a state agency did not certify abstracters, the profession would be responsible for self-regulation and certification. Once certified, the abstracter would be subject to no further regulation or periodic reevaluation.

Certification would provide for public identification of those individuals designated as professional abstracters. The cost of this alternative would be minimal, even less than the cost to operate the current board.

ALTERNATIVE 7: REGISTRATION

Registration is even less restrictive than certification. Registration would require all persons practicing the profession to register with the state or with a private trade or professional association such as the Montana Land Title Association. An applicant would not have to demonstrate competency or prove qualification, just register his name as an abstracter. Once a person is registered there would be no further regulation. This alternative would provide the public with a list of abstracters in the state. The cost of registration would be minimal.

ALTERNATIVE 8: NO LICENSE BUT LIMITED STATUTORY REGULATION

The state could regulate abstracters through bonding and/or insurance and general statutory requirements. The consumer would be monetarily protected in the case of subsequent loss of title through incorrect abstract of title. In the case of abstracters, bonding was established in 1915 and remained in effect until it was repealed by the 1977 Legislature. Board members and the director of the Department of Professional and Occupational Licensing could not recall any situation where the public had ever attempted to file a claim against an abstracter's bond.

Requiring an abstracter to purchase errors and omissions insurance could also be statutorily mandated. The disadvantage to this requirement is that the consumer would have to claim and prove an error or omission by the abstracter in the event of a loss. The corresponding advantage would be that, even though the consumer must prove an error by the abstracter (and probably sue for damages), insurance would always be available to cover any losses brought about through the abstracter's negligence.

The legislature could also establish a recovery fund based upon contributions from licensees which could be used to cover consumer loss. The fund would be administered by a state agency/board.

ALTERNATIVE 9: NO LICENSE; NO STATUTORY REGULATION

This alternative is the other extreme of professional and occupational regulation--that is, no regulation at all. This alternative is suitable where there is no demonstrated public need for state regulation.

The public still has protection and recourse through the Consumer Affairs Division of the Department of Business Regulation under the Unfair Trade Practices Act (Chapter 275, Laws of Montana, 1973), which protects the consumer from fraud and deception. The Unfair Trade Practices Act covers problems such as product or service misrepresentation, false advertising or statements, deceptive pricing, etcetera. Under the act, consumers can bring civil suit and be awarded up to three times actual damages. The court can enjoin the company from doing business and even revoke or suspend the license. The Consumer Affairs Division can investigate, subpoena, request injunction, and bring the offending company to court on behalf of the consumer. These laws on consumer protection are in effect at the present time and would be in effect under all of the alternatives discussed.

CONCLUSION

The Montana sunset law (Section 82-4603(1)(a), R.C.M. 1947), terminates the Board of Abstracters on July 1, 1979. Under the law (Section 82-4604, R.C.M. 1947), a performance audit of the Board of Abstracters by the Legislative Audit Committee must be conducted prior to termination. This performance audit disclosed that there is a questionable need for the present system of state regulation of the abstracter industry in Montana and that there are a number of less restrictive alternative forms of regulation available including no regulation whatsoever by state government.

APPENDIX

APPENDIX I

ABSTRACTERS SURVEY RESULTS

METHODOLOGY

We attended the 1977 Annual Convention of the Montana Land Title Association and distributed 47 questionnaires to meeting participants. Thirty-one questionnaires were returned to our office. Following is a compilation of the responses.

QUESTIONS AND RESPONSES

Do you believe the absence of regulation of abstracters would significantly harm the public health, safety, or welfare?

Category	Response Percentage
Yes	80.6%
No	19.4%
No Opinion	0.0%

Who should regulate abstracters? (Check all that apply.)

Category	Response Percentage
State via Board of Abstracters	57.5%
Insurance Commissioner	15.0%
American Land Title Association	5.0%
Montana Land Title Association	22.5%
Should not be regulated	0.0%
No Opinion	0.0%

Currently, the state regulates abstracters via the Board of Abstracters. The Board of Abstracters' regulation of the profession is:

Category	Response Percentage
Excellent	48.39%
Good	25.81%
Fair	6.45%
Poor	0.0 %
No Opinion	12.9 %
Other	6.45%

Abstract plants should be inspected by a state regulatory board/agency.

Category	Response Percentage
Yes	70.97%
No	19.35%
No Opinion	3.23%
Other	6.45%

If yes, abstract plants should be inspected:

Category	Response Percentage
Annually	0.0 %
Every 2 to 3 years	16.67%
Every 4 to 5 years	58.33%
Should not be inspected	0.0 %
No Opinion	4.17%
Other	20.83%

Should the state regulate prices of abstracts?

Category	Response Percentage
Yes	6.45%
No	83.87%
No Opinion	3.23%
Other	6.45%

Should all abstract plants carry errors and omissions insurance?

Category	Response Percentage
Yes	74.2 %
No	12.9 %
No Opinion	9.7 %
Other	3.2 %

Do lending institutions now require title insurance as opposed to abstracts?

Category	Response Percentage
Yes	77.4 %
No	3.2 %
No Opinion	0.0 %
Other	19.4 %

Is there a trend towards title insurance and away from abstracts?

Category	Response Percentage
Yes	96.8 %
No	0.0 %
No Opinion	0.0 %
Other	3.2 %

What state agency should regulate title insurance if at all?

Category	Response Percentage
Board of Abstractors	54.3 %
Insurance Commissioner	40.0 %
Other	0.0 %
Should not be regulated	5.7 %
No Opinion	0.0 %

Does an abstract monetarily protect the consumer?

Category	Response Percentage
Yes	46.9 %
No	46.9 %
No Opinion	6.2 %
Other	0.0 %

Does title insurance monetarily protect the consumer?

Category	Response Percentage
Yes	100.0 %
No	0.0 %
No Opinion	0.0 %
Other	0.0 %

Which provides the most consumer protection:

Category	Response Percentage
Abstract	8.8 %
Title Insurance	85.3 %
No Opinion	3.0 %
Other	2.9 %

Does the Montana Land Title Association monitor abstract costs?

Category	Response Percentage
Yes	16.7 %
No	63.3 %
No Opinion	13.3 %
Other	6.7 %

With whom do abstracters deal with in most cases?

Category	Response Percentage
Lending Institutions	30.9 %
Real Estate Agents	20.6 %
Lawyers	29.4 %
Consumer	14.7 %
Other	4.4 %

Do lending institutions act in the best interest of consumers when financing real property?

Category	Response Percentage
Yes	58.1 %
No	16.1 %
No Opinion	16.1 %
Other	9.7 %

Does the average consumer know the difference between title insurance and abstracts?

Category	Response Percentage
Yes	35.5 %
No	61.3 %
No Opinion	3.2 %

The \$5,000 bond requirement for abstract plants should be:

Category	Response Percentage
Discontinued	15.4 %
Increased	42.3 %
Decreased	0.0 %
Kept the same	30.8 %
No Opinion	11.5 %
Other	0.0 %

Is there a less restrictive method of regulation available which could adequately protect the public?

Category	Response Percentage
Yes	19.4 %
No	67.7 %
No Opinion	12.9 %
Other	0.0 %

Does state regulation increase the cost of services to the consumer?

Category	Response Percentage
Yes	36.7 %
No	56.7 %
No Opinion	6.6 %

Should individual abstracters be licensed by the state?

Category	Response Percentage
Yes	77.4 %
No	12.9 %
No Opinion	9.7 %

AGENCY REPLIES

STATE OF MONTANA

DEPARTMENT OF PROFESSIONAL & OCCUPATIONAL LICENSING

HELENA, MONTANA 59601

THOMAS L. JUDGE
GOVERNORED CARNEY
DIRECTOR
LALONDE BUILDING
(406) 449-3737

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MAR 17 1978

MONTANA LEGISLATIVE AUDITOR

March 17, 1978

Mr. Morris L. Brusett, Legislative Auditor
 State of Montana
 Office of the Legislative Auditor
 State Capitol
 Helena, Montana 59601

Dear Mr. Brusett:

The subject discussion draft puts the current system of abstract regulation and the need for regulation in the worst possible light. Some of this is due to valid review procedures, which we have no quarrel with. Taken as a whole, the draft is easily summarized as follows:

Abstracts currently fill 25% of title assurance needs, which is an appreciable amount, the present costs of regulation are so low as to be insignificant, no one is suffering the results of poor industry practices under the current system, and the sunsetters cannot prove whether or not this is due to current regulation, even though they say it is not. Despite the low cost of current regulation and the uncertain affects of deregulation, the report is flavored against current regulation. While we are willing to see change in the present methods of regulation, we believe, and this draft even as written supports us, between the lines, that regulation is needed.

While comments have been made on nearly every paragraph of the draft, some matters, are serious enough to deserve special mention at this time.

First, starting at page 20, an extensive list is presented of companies which don't normally use abstracts. It is unfair to list these at such length without going to equal length to list those who use abstracts regularly.

Second, another example of bias is found on page 25, where it is stated that title insurance is virtually mandatory in New Jersey. It is equally relevant that title insurance is outlawed and only abstracts can be used in Iowa, a state definitely more like Montana than New Jersey.

Third, and not a minor point, the paragraph in the middle of page 26 creates the mistaken impression that title insurance is well regulated in Montana. This is certainly obviously not the case. At this point, the beneficial effects of abstracting regulations on title insurance should have been pointed out.

Fourth, throughout the report, use of abstracts is slighted as "very limited" and so on. The report states, however, that abstracts enjoy a 25% use. This is hardly "very limited."

Fifth, a seemingly minor point on page 27 is actually serious because it relates to an item which the sunsetters were informed some time ago was incorrect. In ignoring the facts in this case, the drafters created an impression, perhaps mistaken, that they are not concerned with facts. To clarify matters: Credit will probably be given each parcel where an abstract covers a larger parcel being subdivided.

Sixth, page 28, abstracts are criticized as requiring the interpretive services of an attorney, in supposed contrast to cheap and clean - burning title insurance. The truth is, however, that title insurance commitments in Montana are usually examined by the buyers attorney or at least by an experienced bank loan closer.

Seventh, an entire paragraph using slated language appears at the bottom of page 33. The statute requires a registered abstracter to be in charge of abstracting. All abstracting business here referred to was in fact in charge of a registered abstracter, and a registered abstracter was in fact working in the facilities when needed. This was explained to you by Mr. Cady, not "confirmed" in the sense the drafters used that word.

We must insist, eighth, that the material regarding Deister, Ward and Witcher be corrected in line with facts presented to you by letter.

Ninth, the evaluation of examinations is based on conjecture and not on a qualified review of the exams.

Tenth, the comment could be made regarding the drafters remarks at the bottom of page 37, that the performances of medical operations by prosthesis salesmen is an obvious indication of the need to deregulate doctors.

Eleventh, throughout the draft report, current regulation is criticized as not being comprehensive enough. All of a sudden current regulation is described in the possible alternatives as being overly restrictive. It obviously cannot be both, and we feel that it is in fact just the right amount of regulation.

As to the balance of the alternatives, these are our comments.

#2 would be acceptable, but would in fact cost more, because you would need the same board, plus extra technical services.

#3 would be acceptable but might tend to increase the cost of abstracts. Due to the nature of the industry, comprehensive and fair examinations would be difficult, if not administered and graded by persons having a full understanding and working knowledge.

#4 and #5 are subject to the same criticism as #3

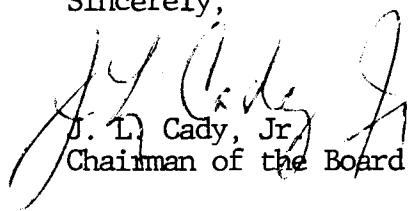
#6 would be acceptable if tied in with satisfactory plant laws.

#7, #8 and #9 are unacceptable because the public needs greater laws.

The enclosed solicitation for job applicants points out the positive value that a Registered Abstracter enjoys under our present licensing system.

We believe that in view of the very low costs of current regulation, the definitely high industry standards under current regulation, and the absence of any proof that the industry would operate on the same level without regulation, all as stated in the draft report, the only fair conclusion is that regulation should continue in the same or similar form. To fairly implement the sunset act procedure, we request and reserve the right to appear and be heard at the public hearings in connection herewith.

Sincerely,



J. L. Cady, Jr.
Chairman of the Board

JLC/lfc

STATE OF MONTANA
DEPARTMENT OF PROFESSIONAL & OCCUPATIONAL LICENSING
HELENA, MONTANA 59601

THOMAS L. JUDGE
GOVERNOR



ED CARNEY
DIRECTOR
LALONDE BUILDING
(406) 449-3737

NOTICE OF POSITION VACANCY

TITLE: ABSTRACTER 11, GRADE 11
Starting Salary \$939.42 per month

GENERAL DUTIES: Performs complex research into and maintenance of title documents to provide proper ownership information and title evidence concerning land transactions.

EXAMPLES OF DUTIES: Maintains records and abstract book for titles to state-owned lands, land sales, sales contracts and issuance of deeds; reviews titles to provide proper ownership information; review preliminary plans to determine where title evidence is required.

Must have thorough knowledge of abstract records, sales contracts, patents, deeds, and research procedures.

MUST BE A REGISTERED AND LICENSED ABSTRACTER IN
THE STATE OF MONTANA

EXPERIENCE: Three years of office and title research experience or any equivalent combination of education and experience.

Interested applicants should submit a State of Montana Application for Employment form to:

LEROY A. BROUGHTON, ADMINISTRATOR
HIGHWAY PERSONNEL DIVISION
DEPARTMENT OF HIGHWAYS
HIGHWAY BUILDING, ROOM 215
HELENA, MT 59601

THANK YOU.

STATE OF MONTANA
DEPARTMENT OF PROFESSIONAL & OCCUPATIONAL LICENSING
 HELENA, MONTANA 59601

THOMAS L. JUDGE
 GOVERNOR



ED CARNEY
 DIRECTOR
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 (406) 449-3737

March 17, 1978

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MAR 17 1978

MONTANA LEGISLATIVE AUDITOR

Morris L. Brusett, Legislative Auditor
 Office of the Legislative Auditor
 State Capitol Building
 Helena, MT 59601

Dear Mr. Brusett:

At this point in time I will have no specific comments on the 64 pages of the body of the Sunset Performance Review of the Board of Abstracters. The right to comment at a later date is reserved. My comments at this time will be restricted to the various alternatives as viewed from dollars and cents.

ALTERNATIVE 1

No comment, because this alternative represents the present procedure as prescribed by law.

ALTERNATIVE 2

This alternative represents more cost because board members will not be from the profession and will have to hire technical competence to assist in various technical aspects. Continued and sustained interest will be a problem with public members.

ALTERNATIVE 3

The role of an existing department taking over the functions of the board will be more costly, because even with the assumption that time expended would be no more than the time expended by board members. This is true because board members work for \$25.00 per day and a Grade 4, Step 1 individual will be paid \$26.48 per day including employee benefits. Reservations exist on whether a Grade 4 individual can do the work involved. Most board members expend time for which they are not compensated in the ordinary process of being a board member and this will not be true of agency work.

ALTERNATIVE 4

The key cost factor here would be the period of years for which a license would be granted before renewal. Continuing Education will cost money for the agency to administer and for the individual to pursue. Periodic

re-examination would be a first in Montana for the many professions and occupations and will cost money. This alternative has the appearance of being more costly.

ALTERNATIVE 5

This may not be a viable alternative and may represent change for the sake of change; the plant or firm is presently granted a certificate of authority and individual registrations will be eliminated.

ALTERNATIVE 6

Certification is usually done by someone other than a state agency, and the field is essentially unregulated by state law. The ability of a professional association to certify and regulate is limited, because the individual does not have to be certified and the average member of the public using the service is not aware of a certification list. Cost would be less than the present system, unless complaint problems would come under Consumer Affairs Law.

ALTERNATIVE 7

Virtually the same as certification and hard to distinguish unless terms are defined.

ALTERNATIVE 8

To require bonding or insurance, or a recovery fund by law will not effectively change procedure in effect prior to 1977 Legislature removal of bonding requirement, except to eliminate registrations and certificates, examinations and inspections. This alternative will involve agency time and doubtful cost savings.

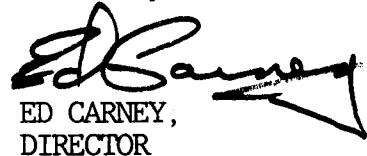
ALTERNATIVE 9

This alternative will save dollars providing only limited involvement of the Consumer Affairs Division takes place. Very limited investigation and litigation can take place for \$2569.00 which is the appropriation for the Board of Abstracters for FY 78. To assume that this alternative will save money can be true, but it is also possible it will cost money to the general fund which provides the money for the Consumer Affairs Division. The entire amount of the present appropriation is funded by individual abstracters and abstract firms and a shift of responsibility will shift dollar costs to the general fund.

The conclusion of the comments on the various alternatives is that generally no cost savings will be the result. No regulation will represent a potential threat to the consuming public and the general fund may be expected to provide minimum protection to the public thru consumer protection laws. Alternatives 3, 4, 5, and 8 involve the elimination of citizen board members conducting a phase of state government business; the questions follows: is this the proper road to follow when we have the general concern of more citizen and public involvement in government business?

I am appreciate of the opportunity to express these few thoughts for your consideration. Should the Legislative Audit Committee, yourself or staff members have any questions on my comments, I will do my best to provide further explanation.

Sincerely,


ED CARNEY,
DIRECTOR

EC/lfc

STATE OF MONTANA

Office of the Governor

Budget and Program Planning

Thomas L. Judge
Governor

George L. Bousliman
Director

Capitol Building - Helena, Montana 59601

February 14, 1978

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FEB 14 1978

Joe J. Calnan
Deputy Legislator Auditor
Office of the Legislator Auditor

MONTANA LEGISLATIVE AUDITOR

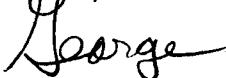
Dear Joe:

Thanks for the opportunity to review your draft report on the Board of Abstracters.

Kent Kleinkopf, Director of the Department of Business Regulation, Jim Flynn, Director of the Office of Commerce and Small Business Development and I are in agreement that the report is a complete and accurate treatment of the subject. However, we would point out that if the Legislature chooses alternative number 9 (no license; no statutory regulation) and relies upon the current consumer protection powers of the Department of Business Regulation or the Attorney General, non-budgeted costs may ensue. While perhaps not a problem in the case of the abstracting business, we would urge consideration of this prospect in all sunset audits.

Again thanks for the invitation to comment.

Sincerely,



George L. Bousliman
Director



STATE OF MONTANA

OFFICE OF
E. V. "SONNY" OMHOLT
 STATE AUDITOR
 COMMISSIONER OF INSURANCE
 INVESTMENT COMMISSIONER
 CENTRAL PAYROLL SYSTEM

HELENA, MONTANA 59601

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MONTANA LEGISLATIVE AUDITOR

February 14, 1978

Office of the Legislative Auditor
 State of Montana
 State Capitol
 Helena, Montana 59601

ATTENTION: Mr. Joseph J. Calnan
 Deputy Legislative Auditor

RE: Performance Audit - Board of Abstractors

Thank you for your letter of February 6th submitting the captioned report for our consideration.

We have no objections to this report, nor the references to those areas under our jurisdiction.

We are returning the report in accordance with your request.

E. V. "SONNY" OMHOLT
 STATE AUDITOR & EX OFFICIO
 COMMISSIONER OF INSURANCE

J. Driscoll
 Josephine M. Driscoll, CPIW
 Chief Deputy Insurance Commissioner

JMD:s
 encl.